Docket for 03-674

(12)

No. 03-674
Title: Keyse G. Jama, Petitioner
v.
Immigration and Naturalization Service
Docketed: November 5, 2003
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (02-2324)
Decision Date: May 27, 2003
Rehearing Denied: August 6, 2003
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 4 2003	Petition for a writ of certiorari filed. (Response due December 5, 2003)
Nov 26 2003	Order extending time to file response to petition to and including January 5, 2004.
Jan 5 2004	Brief of respondent Immigration and Naturalization Service in opposition filed.
Jan 13 2004	Reply of petitioner Keyse G. Jama filed.
Jan 21 2004	DISTRIBUTED for Conference of February 20, 2004.
Feb 23 2004	Petition GRANTED.
Mar 16 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including May 10, 2004.
May 3 2004	Order extending time to file the joint appendix and petitioner's brief on the merits to and including May 18, 2004.
May 18 2004	Brief amici curiae of Yusuf Ali Ali, et al. filed.
May 18 2004	Brief of petitioner Keyse G. Jama filed.
May 18 2004	Joint appendix filed.
May 18 2004	Brief amici curiae of International Human Rights Organizations and International Law Professors filed.
May 25 2004	Extension of time within which to file respondent's brief on the merits to and including July 22, 2004.
Jul 22 2004	Brief of respondent Immigration and Naturalization Service filed.
Jul 22 2004	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed.
Aug 5 2004	CIRCULATED.
Aug 10 2004	Record received from U.S.C.A. 8th Circuit. (1 box)
Aug 10 2004	Record received from U.S.D.C. for Dist. of Minnesota. (1 box)
Aug 24 2004	SET FOR ARGUMENT Tuesday, October 12, 2004.
Aug 26 2004	Reply of petitioner Keyse G. Jama filed. (Distributed)
Oct 12 2004	Argued. For petitioner: Jeffrey Keyes, Minneapolis, Minn. For respondent: Malcolm L. Stewart, Assistant to the Solictior General, Department of Justice, Washington, D.C.

Phone: - -

Supreme Court, U.S.
FILED

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No. 03-

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal.

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

On March 1, 2003 the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the Bureau of Immigration and Customs Enforcement in the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002 §§ 2, 101, 441, 442, 6 U.S.C.A §§ 101, 111, 251, 252 (West Supp. 2003).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Keyse G. Jama petitions this Court for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is reported at 329 F.3d 630. The Magistrate Judge's Report and Recommendation (Pet. App. 21a) is unreported. The District Court's Final Order (Pet. App. 42a) is unreported. The order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (Pet. App. 56a) is unreported. The order of the Eighth Circuit denying the motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari (Pet. App. 57a) is unreported.

JURISDICTION

The judgment of the Eighth Circuit was entered on May 27, 2003. A timely petition for rehearing and for rehearing en banc was denied on August 6, 2003. A timely motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari was denied on August 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the removal statute, 8 U.S.C. § 1231(b)(2), provides:

(2) Other aliens

Subject to paragraph (3)—

(A) Selection of country by alien

Except as otherwise provided in this paragraph—

(i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into that country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

STATEMENT OF THE CASE

In holding that 8 U.S.C. § 1231(b) authorizes the government to remove (deport) a person from the United

States without first establishing that the country in question would accept his or her return, the Eighth Circuit acknowledged that it was splitting from nearly a half-century of judicial authority: "[Petitioner] cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them . . . ." Pet. App. 6a.

Just four months after the Eighth Circuit's decision, the Ninth Circuit unequivocally confirmed the existence of this split in *Ali v. Ashcroft*, — F.3d —, 2003 WL 22137018 (9th Cir. Sept. 17, 2003):

> Requiring acceptance before removal is consistent with all of the case law that has touched on the question. The one exception is the Eighth Circuit's decision in *Jama* . . . . We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is "no settled judicial construction of the provision in question."

Id. at *7, *aff'g Ali v. Ashcroft*, 213 F.R.D. 390 (W.D. Wash. 2003). Indeed, the First, Second, Ninth, and D.C. Circuit Courts of Appeals have all interpreted the relevant statutory language to require acceptance by the destination country before removal may be effected. *See Tom Man*, 264 F.2d at 928; *Chi Sheng Liu v. Holton*, 297 F.2d 740, 743 (9th Cir. 1961); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 185 (D.C. Cir.), *cert. denied*, 375 U.S. 833 (1963); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958); *see also Pelish v. I.N.S.*, 329 F.3d 1057, 1061 (9th Cir. 2003); *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988). The Eighth Circuit opinion thus creates a split between the decisions of the United States Courts of Appeals on the same important question of law. The Eighth Circuit decision conflicts with the statutory language and legislative history and is

inconsistent with the United States' own rules and regulations, and with international law. The resulting split in the courts of appeals creates the undesirable situation in which the Attorney General applies one interpretation of the federal statute, which requires acceptance prior to removal, in the Eighth Circuit and the opposite interpretation in other jurisdictions in the United States.

1. Petitioner was born in Somalia in 1979. Pet. App. 43a. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, Petitioner and his family applied for admission to the United States as refugees. Their application was granted and Petitioner arrived in the United States in February 1996. Petitioner later settled in Minnesota, where he worked and attended school. He never became a United States citizen or permanent resident alien, but rather retained his refugee status. *Id.*

In June 1999, Petitioner fought with another Somali man, and in September 1999, Petitioner pled guilty to third degree assault, a felony under Minnesota law. Pet. App. 44a. As a result of Petitioner's felony conviction, the INS initiated removal proceedings against Petitioner and he was taken into INS custody in June 2000 upon completion of his prison sentence. *Id.* An Immigration Judge found Petitioner removable from the United States based upon his criminal conviction. The INS sought to remove Petitioner to Somalia as the country in which he was born, pursuant to 8 U.S.C. § 1231(b)(2)(E)(iv).

2. Somalia has been without a central government since the ouster of dictator Siad Barre in 1991. *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash. 2003). Over the last decade, warring factions have controlled fiefdoms in various regions of the country, and a state of general chaos persists. *Id.* The United States has no diplomatic relations with Somalia, maintains no embassy in Somalia, and has no consular

relations with a government in Somalia. *See* Resp't Return Exs. Vol. ("Ex. Vol.") at 203 & 216. Because no functioning government exists in Somalia, Petitioner does not have, nor could he receive, a passport or other internationally recognized documents establishing him as a former resident or citizen of Somalia.

3. Before the intervention of the district court, INS agents planned to remove Petitioner to Somalia without any acceptance or repatriation by a government. *See* Joint Appendix ("J.A.") at 78; Ex. Vol. at 239, 243. The INS agents would not have accompanied Petitioner into Somalia, presumably because no government has accepted his repatriation and because travel there is too dangerous. Ex. Vol. at 238-39, 243. Instead, the INS planned to accompany Petitioner as far as Dubai in the United Arab Emirates, then to place Petitioner on a flight into Somalia. During the time in question, news services were reporting people being killed "at the very airport where the INS seeks to drop [him]." Pet. App. 26a (quotation omitted). When Petitioner landed in Somalia, he would become a stateless person with no travel documents or identity papers in a war-torn region with no central government.

4. For nearly fifty years, the removal statute 8 U.S.C. § 1231(b) and its virtually identical predecessor, section 243(a) of the Immigration and Naturalization Act ("I.N.A."), 8 U.S.C. § 1253(a), have been interpreted as requiring acceptance by the government of the country designated as the place for deportation. As a result, it is not unusual for deportees to remain in the United States, sometimes for long periods of time, until such acceptance can be achieved. There have been, for example, thousands of deportees in the United States whom, over the years, the INS has not deported to countries such as China, Vietnam, Cambodia, and Cuba. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 (May 11, 1998) (noting that most aliens in

extended INS detention come from countries that do not have diplomatic relations with the U.S. and no country will accept them); *see also* J.A. at 81-86.

5. After the INS issued a warrant of removal notifying Petitioner of its intent to deport him, Petitioner filed a petition for a writ of habeas corpus to prevent removal until the acceptance conditions of the governing statute were satisfied. Pet. App. 13a. Petitioner argued that under 8 U.S.C. § 1231(b)(2) the INS could not remove him to Somalia without first establishing that Somalia would accept his return. Pet. App. 45a.

6. The United States District Court for the District of Minnesota (Tunheim, J.), adopting the Report and Recommendation of the Magistrate Judge (Pet. App. 21a), granted habeas relief in favor of Petitioner. The district court found that the government's interpretation of step three of 8 U.S.C. § 1231(b)(2) would have rendered step two, which explicitly requires acceptance by a country of which the alien is a "subject, national, or citizen," meaningless. Pet. App. 51a. Therefore, the court adopted a construction of the statute which gave effect to all of its provisions and held that the acceptance requirement was meant to apply to all of the clauses listed in step three of the removal statute, § 1231(b)(2)(E). *Id.*

The district court relied upon previous court decisions, including decisions from the Second and District of Columbia Circuit Courts of Appeals, which had interpreted 8 U.S.C. § 1253(a), the statutory predecessor to § 1231(b)(2), and held that acceptance from the removal country was required at § 1231(b)(2)(E). *Id.* The district court found that the previous and current statutes were essentially identical and thus the previous holdings of the courts of appeals remained in force:

> The Court has carefully reviewed both statutes but finds no meaningful distinction between the two

> statutes. Aside from the introduction of subheadings into the statute's text, the language in the old statute, as the government itself concedes, contains the same or similar language that is found in § 1231(b)(2). Accordingly, the holdings in *Tom Man* and similar cases are on all fours with the interpretation of the statute in this case.

Id. at 52a.

7. The INS appealed and a divided panel of the Eighth Circuit reversed. Pet. App. 1a. The majority held that, because Congress explicitly inserted an acceptance requirement into steps one and two of the removal statute, the absence of an explicit acceptance requirement in all the individual clauses of step three but the final clause indicated that acceptance by the removal country was not required. *Id.* at 6a. In so holding, the majority rejected previous decisions of various courts of appeals, stating, "[w]e are not bound by these decisions; indeed, we are not persuaded by them . . . ." *Id.*

The Eighth Circuit recognized that its interpretation would lead to the anomalous result in which a country could refuse to accept one of its subjects, nationals, or citizens for removal under step two and the government could then forcibly remove the alien to that same country as an "additional country" under step three. The Eighth Circuit majority rationalized this result by stating that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Id.* at 7a.

REASONS FOR GRANTING THE PETITION

I. THE RECENT DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS ARE IN DIRECT CONFLICT.

"For nearly a half century, the courts have held the

United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien." Pet. App. 9a (Bye, J., Dissenting) (collecting cases). In ruling that step three of the removal statute, 8 U.S.C. § 1231(b)(2)(E), does not require acceptance by the removal country, the Eighth Circuit explicitly rejected this authority. *Id.* at 6a.

Indeed, just four months after the Eighth Circuit's decision, the Ninth Circuit again reaffirmed the acceptance requirement in *Ali v. Ashcroft*, — F.3d —, 2003 WL 22137018 (9th Cir. Sept. 17, 2003). The Ninth Circuit held that while acceptance is explicitly required in steps one and two, a careful reading of the statute demonstrates that acceptance is also implicitly required for all removals in step three. *Id.* at *6.

Further, the Ninth Circuit explicitly recognized its conflict with the Eighth Circuit: "We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is 'no settled judicial construction of the provision in question.'" *Id.* at *7 (quoting Pet. App. 7a).

II. THE EIGHTH CIRCUIT'S OPINION STANDS ALONE.

1. With the exception of the Eighth Circuit's decision, federal courts have consistently interpreted the seven subsections of § 1231(b)(2)(E), and its predecessor, 8 U.S.C. § 1253(a), to require acceptance for each of the "additional removal countries." *See Ali*, — F.3d —, 2003 WL 22137018, at *7 ("Requiring acceptance before removal is consistent with all of the case law that has touched on the question"); *see also* Pet. App. 52a ("in fifty pages of briefing, the government '*has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him.*'") (quoting Pet. App. 38a). For example, Judge Learned Hand of the Second Circuit concluded that "we think that

deportation under any of these is subject to the condition expressed in the seventh subdivision: *i.e.* that the 'country' shall be 'willing to accept' him into its territory." *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959). *Accord Chi Sheng Liu v. Holton*, 297 F.2d 740, 743 (9th Cir. 1961) (following *Tom Man* and stating that former § 1253(a) "provides that an alien cannot be deported to any country unless its government is 'willing to accept him into its territory'"); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 185 (D.C. Cir.), *cert. denied*, 375 U.S. 833 (1963) ("It must be remembered . . . that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. It must be carried out through arrangements made with the foreign government.") (quotation omitted); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958) (preceding *Tom Man* and affirming that the Attorney General may not deport the plaintiff to China "until and unless" the government indicates its willingness to accept the plaintiff); *see also Pelish v. I.N.S.*, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that an alien "can be deported to the country of his birth or to a country where he resided prior to entering the United States (assuming these countries would take him)"); *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988) (interpreting 8 U.S.C. § 1227(a)(2) to require a country to accept an alien prior to deportation based on the settled construction of the parallel provision in § 1231(b)(2)).

2. Because the current and previous statutes are essentially identical, these decisions remain in full force and effect.

> Former § 1253(a) is essentially identical to § 1231, providing the same three-step process, explicitly requiring acceptance in the first two steps and then, in the third step, listing the six additional countries and stating in the seventh clause that the Attorney General may deport the alien to "any country which is willing to accept such alien into its territory."

Ali, — F.3d —, 2003 WL 22137018, at *7. *See also Ali v. Ashcroft*, 213 F.R.D. at 403 ("A review of the text of the statute prior to and since the amendments shows that the two versions are substantially indistinguishable."); Pet. App. 52a ("The Court has carefully reviewed both statutes but finds no meaningful distinction between the two statutes.").

3. The Board of Immigration Appeals ("BIA") also has consistently interpreted § 1232(b)(2) to require acceptance by the designated country under all three steps of the country selection process. *See In re Linnas*, 19 I. & N. Dec. 302, 307 (BIA 1985) (concluding that the language of the statute "expressly requires, or has been construed to require that the government of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory'"); *see also In re Anunciacion*, 12 I. & N. Dec. 815, 818 (BIA 1968) (stating that the designated country must accept the deportee under all three steps of the statute); *cf. In re Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962) (holding that a *preliminary* inquiry by the immigration judge at the time of country designation is not required).

4. Moreover, Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990 and 1996 without making material changes to the removal statute. The fact that Congress declined to make substantive changes in the face of a clear line of precedent reveals that Congress intended the statute to be interpreted as it consistently had been, requiring acceptance from the removal country for each of the three steps. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); Pet. App. 10a ("Each time Congress amended the INA or re-enacted the statutory provisions which now appear at § 1231(b)(2) without making

any material changes to the precursor statute, it adopted the well-settled construction given the precursor by the courts and the INS.") (Bye, J., dissenting).

III. THE ACCEPTANCE REQUIREMENT IS A MATTER OF NATIONAL IMPORTANCE

1. The present matter is of national importance and implicates fundamental issues of human rights. As recognized by the dissent in *Jama*, without an acceptance requirement, "we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords." Pet. App. 12a (Bye, J., dissenting). Regarding Somalia, "[t]he Government's own submissions . . . ha[ve] shown that Somalia is a country in chaos, engaged in clan warfare with rival groups clashing over turf and control, with no government and no diplomatic relations with the United States. There is no official entity that might provide even the most basic of administrative protections upon their [the aliens'] arrival." *Ali v. Ashcroft*, 213 F.R.D. at 400.

The government confirms that deportation to Somalia implicates fundamental human rights concerns:

> There is an ongoing armed conflict within Somalia and, due to such conflict, requiring the return of aliens who are nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) would pose a serious threat to their personal safety . . . . Furthermore, there exist extraordinary and temporary conditions in Somalia that prevent nationals of Somalia (and aliens having no nationality who last habitually resided in Somalia) from returning home in safety . . . . Finally, permitting nationals of Somalia to remain temporarily in the United States is not contrary to the national interest of the United States.

Temporary Protected Status Program, 67 Fed. Reg. 48,950 (July 26, 2002).

2. Due to its conflict with other courts of appeals, the Eighth Circuit's decision will cause disparate results in deportation proceedings, an area of national importance where uniformity should govern, and will extend beyond Somali deportees. The practical effect of the *Jama* decision is that deportation will depend upon the circuit in which the person to be removed is held. If, for example, an alien subject to removal is located in New York City or Seattle, then he could not be removed to a country like Somalia because the *Tom Man* and *Ali* decisions would bar removal until acceptance could be obtained. If, on the other hand, the alien to be removed is located in Minneapolis, the government could utilize the Eighth Circuit's view of the removal statute. The net result of the split between the circuits would be sharply different treatment of identically situated aliens based solely on the location in which they are detained.

IV. THE EIGHTH CIRCUIT'S INTERPRETATION OF THE REMOVAL STATUTE IS ERRONEOUS.

1. The removal statute establishes a three-step process for determining a removable alien's destination country. In the first step, the alien may designate a country of removal, subject to certain limitations. § 1231(b)(2)(A). The Attorney General may disregard the alien's designation under four specified circumstances, including if, "the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country," or if "the government of the country is not willing to accept the alien into the country." § 1231(b)(2)(C)(ii) & (iii). Petitioner did not make a timely designation under this section, so the first step does not apply.

If the first step has failed to result in a country of removal, then in the second step, the Attorney General is

removal, then in the second step; the Attorney General is directed to "remove the alien to a country of which the alien is a subject, national, or citizen," unless the country is unwilling to accept the alien or fails to indicate (upon an inquiry by the Attorney General) that it will accept the alien. § 1231(b)(2)(D). Because the "government of the country" of which Petitioner is a "citizen" has failed to accept him, step two does not result in a country of removal for Petitioner.

Therefore, it is undisputed that Petitioner's removal must be determined at step three. Pet. App. 5a. Step three then designates additional removal countries should the Attorney General be unsuccessful in removing the alien at steps one and two:

> **(E) Additional removal countries**
>
> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> **(i)** The country from which the alien was admitted to the United States.
>
> **(ii)** The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> **(iii)** A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> **(iv)** The country in which the alien was born.
>
> **(v)** The Country that had sovereignty over the alien's birthplace when the alien was born.
>
> **(vi)** The country in which the alien's birthplace is located when the alien is ordered removed.
>
> **(vii)** If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E) (2000).

2. As the Ninth Circuit recognized, reading § 1231(b)(2)(E)(i)-(vi) not to require acceptance would render § 1231(b)(2)(C) and (D) superfluous because, in many instances, the applicable countries would be the same:

> [I]n a situation where a government has actually denied acceptance of a removable person, a person could be airdropped surreptitiously into that same country if it met the requirements of one of the sub-parts . . . . The only logical interpretation of the plain meaning that gives effect to all sections of the statute is one that requires government acceptance from "additional" countries listed in § 1231(b)(2)(E)(i)-(vi).

Ali, — F.3d —, 2003 WL 22137018, at *6.

Similarly, "the plain language of the statute indicates that the option to remove a person to the country in which he or she was born only exists where that country is different from the countries in steps 1 and 2." *Id.* If, for example, "the country designated by the alien was the same as his birth country, the anomalous situation could occur where the country designated by the alien in step one refuses to accept the alien yet the INS could still remove the alien to that very same country under step three." *Id.* The Court concluded that "the INS should not be allowed to thwart [the acceptance requirement of step one and step two] by skipping to step 3." *Id.*

3. The legislative history of the statutory provision further establishes that acceptance is required for removal. The removal statute, 8 U.S.C. § 1231(b), was originally enacted in 1952. *Ali v. Ashcroft*, 213 F.R.D. at 403. Even in light of Cold War national security concerns, the government

recognized that it could not deport persons absent acceptance:

> One of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported . . . . The nature of the problem was described by Immigration and Naturalization Service in its 1948 report: "Following an order of deportation a passport or other travel document must be procured for the alien in order for him to enter the country to which he is to be deported . . . . If [the INS or State Department] is unsuccessful in such requests [for travel documents], the alien cannot be deported."

Ali v. Ashcroft, 213 F.R.D. at 404 (quoting *The Immigration and Naturalization Systems of the United States*, Report of the Committee on the Judiciary of the Senate 637-38 (1950) ("Senate Report")).

Congress considered several options to address this problem, including detention, orders of supervision, and "authorizing the Attorney General, within his discretion, to deport an alien to any country which would accept him into its territory." Senate Report at 638. Thus, the legislative history indicates that Congress, in adding "additional countries of removal" to § 1231(b) and its predecessor, was attempting to provide the executive branch options in case acceptance was not obtained from a person's designated country. *Ali v. Ashcroft*, 213 F.R.D. at 403. There is no support for the argument that Congress intended to eliminate the need for acceptance from the receiving country. *Id.*

4. The government's own operating instructions and regulations confirm the acceptance requirement. DHS Operating Instruction 243.1(c)(1) states that "deportation cannot be effected until travel documentation has been obtained." DHS Operating Instructions 243.1, *available at*

WL 22137018, at *9. If the country designated by the alien is unlikely to receive him, a simultaneous request for travel documents is to be made "to the authorities of the country to which he is likely to be deported." *Id.* Travel documents represent internationally-recognized documentation, such as a passport. The government admits that official travel documents cannot be obtained from Somalia. *See* Resp't Appeal Br. at 10.

Applicable federal regulations reinforce Petitioner's interpretation. 8 C.F.R. § 241.4(k)(1) provides for a "custody review . . . where the alien's removal, while proper, cannot be accomplished during the removal period because no country currently will accept the alien." *Ali*, — F.3d —, 2003 WL 22137018, at *9. And 8 C.F.R. § 241.5(c)(1) authorizes issuance of employment authorization to an alien released from custody if the "[t]he alien cannot be removed because no country will accept the alien."

Finally, 8 U.S.C. § 1231(a)(7) provides:

> [N]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that . . . the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.

Thus, the Eighth Circuit's opinion is wholly inconsistent with the United States' own laws, rules, and regulations.

5. The acceptance requirement is also consistent with the rule of statutory construction that, where possible, a statute will be construed in a manner that avoids violating international law. *Ali*, — F.3d —, 2003 WL 22137018, at *10. As the Ninth Circuit recognized in *Ali*, "the government still does not challenge the assertion that Petitioners would be subject to human rights abuses if removed to Somalia." *Id.*

Indeed, removing persons to Somalia "would subject them to human rights abuses in violation of customary international law and provisions of three multilateral treaties to which the United States is a signatory." *Id.* at *9 (quotation omitted) (referring to the 1967 Protocol Relation to the Status of Refugees, 606 U.N.T.S. 267; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, SER at 157-62) (quotation omitted)).

Accordingly, the Eighth Circuit's reading of the removal statute unnecessarily creates an interpretation that is inconsistent with international law. Such a reading conflicts with well-settled rules of statutory interpretation. "Although Congress *may* override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations." *Id.* at *10 (quoting *Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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November 3, 2003

APPENDICES

APPENDIX

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

No. 02-2324

United States Court Of Appeals
for the Eighth Circuit

Submitted: February 12, 2003

Filed: May 27, 2003

*631 Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

MORRIS SHEPPARD ARNOLD, Circuit Judge.

More than three years after he entered the United States, Somalian refugee Keyse Jama pleaded guilty to third degree assault in Minnesota state court. As a result of this felony conviction, the Immigration and Naturalization Service (INS)[1] initiated removal proceedings against Mr. Jama as an alien who had been convicted of "a crime involving moral turpitude." *See* 8 U.S.C. § 1182(a)(2)(A)(i)(I). Mr. Jama conceded his removability, and the immigration judge rejected his applications for humanitarian relief. The Board of Immigration Appeals (BIA) affirmed the immigration

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[1] On March 1, 2003, after the parties argued this case but before this opinion was filed, the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002); 79 Interpreter Releases 1777, 1777 (2002). For ease of reference and because of the status of the agency at the time this case was submitted, this opinion will refer to the agency as the INS.

judge's decision. After the INS issued a warrant of removal to Mr. Jama, *see* 8 C.F.R. § 241.32, he filed a petition for a writ of habeas corpus to prevent the execution of his removal order, *see* 28 U.S.C. § 2241. In that petition, Mr. Jama argued that under 8 U.S.C. § 1231(b)(2), the INS could not remove him to Somalia without first establishing that Somalia would accept his return.

The district court granted habeas relief in favor of Mr. Jama, and the INS appeals that decision. We believe that the district court correctly concluded that it had jurisdiction to consider Mr. Jama's habeas peti- ***632** tion, but we reverse the district court's order granting the writ.

I.

The INS seeks review of the district court's conclusion that it had jurisdiction under 28 U.S.C. § 2241 to consider Mr. Jama's habeas petition. Relying on general principles of procedural default and waiver, the INS first argues that Mr. Jama should have challenged the INS's decision to remove him to Somalia by bringing a timely petition for review in this court following the administrative proceedings that resulted in his final order of removal to Somalia. *See* 8 U.S.C. § 1252(a)(1), (b)(1), (b)(2), (b)(9); 28 U.S.C. §§ 2341-2349. But as both parties recognize, Congress has directed that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime of moral turpitude. *See* 8 U.S.C. §§ 1252(a)(2)(C), 1182(a)(2)(A)(i)(I).

Although it is true that we retain "direct review" jurisdiction to determine whether an alien's criminal conviction is indeed the type of offense that subjects him to removal, as well as to consider substantial constitutional challenges to the Immigration and Nationality Act (INA), neither of these exceptions applies in Mr. Jama's case. *See, e.g.*, *Vasquez-Velezmoro v. INS*, 281 F.3d 693, 695-96 (8th Cir. 2002). Mr. Jama has long since conceded that his

criminal conviction renders him removable. Mr. Jama does not, as the INS suggests, raise a substantial constitutional challenge to the INA. Mr. Jama's challenge is one of statutory construction, notwithstanding his fleeting (and we think unavailing) references to the procedural and substantive due process implications of removing him to a country that has not agreed to accept him.

The INS also contends that the district court lacked jurisdiction over Mr. Jama's habeas petition because it constitutes a challenge to the execution of a removal order prohibited by 8 U.S.C. § 1252(g). That statute provides in relevant part that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to . . . execute removal orders." 8 U.S.C. § 1252(g). Mr. Jama, however, is not objecting to an unfavorable discretionary decision or action to execute the removal order. *Cf. Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482-85, 487 (1999). He challenges, rather, the Attorney General's construction of a statute; specifically, the Attorney General's legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return. Our role here (and the role of the district court below) is not to second-guess the Attorney General's exercise of his discretion; it is to address a purely legal question of statutory construction. *Cf. Demore v. Kim*, No. 01-1491, 2003 WL 1960607, at *5 (U.S. April 29, 2003). We believe, therefore, that Mr. Jama's question is simply outside the scope of the jurisdiction-stripping provision of § 1252(g).

We note, moreover, that permitting Mr. Jama to proceed with his habeas petition is entirely consistent with the principles set forth in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), *Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001), and *Demore*, 2003 WL 1960607, at *5. Although those cases did not address § 1252(g), we believe that they are pertinent

to the jurisdictional issue at hand. Absent a "clear, unambiguous, and express statement of congressional intent" to the ***633** contrary, we have no reason to assume that Congress intended to preclude the district court's habeas review of a pure question of law such as the one presented by Mr. Jama. *See St. Cyr*, 533 U.S. at 298-99, 314. We note further that construing § 1252(g) to eliminate "review of a pure question of law by any court would give rise to substantial constitutional questions." *See id.* at 300, 305; U.S. Const. Art. I, § 9, cl. 2.

II.

The INS also asserts that the district court misconstrued 8 U.S.C. § 1231(b)(2) when it concluded that that statute requires the INS to establish that Somalia will accept Mr. Jama's return prior to removing him to that country. We agree. Before we turn to the merits of the INS's argument, we review briefly the statute at issue here.

Section 1231(b)(2) sets forth a progressive, three-step process for determining a removable alien's destination country. The statute first permits the alien to select a country of removal, subject to certain limitations if the country designated is one that is contiguous or adjacent to the United States. 8 U.S.C. § 1231(b)(2)(A)-(B). The Attorney General may disregard the alien's designation under four specified circumstances; for example, if the designated country is unwilling to accept the alien. 8 U.S.C. § 1231(b)(2)(C), (b)(2)(C)(iii). In the second step, assuming the alien has failed to select a country or cannot be removed to his designated country under step one, the Attorney General is directed to "remove the alien to a country of which the alien is a subject, national, or citizen" unless the country is unwilling to accept the alien or fails to indicate (upon an inquiry by the Attorney General) that it will accept the alien. 8 U.S.C. § 1231(b)(2)(D).

If the alien is not removed to a country where he is a subject, national, or citizen, then the Attorney General must proceed to the third step of the process. That step entails selecting a destination country from a list of statutory "[a]dditional removal countries," as follows:

> (i) The country from which the alien was admitted to the United States.
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> (iv) The country in which the alien was born.
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
>
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.
>
> (vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E)(i)-(vii). In this case, the parties agree that Mr. Jama's removal destination must be determined at the third step of the process, and it is to this step that we now turn.

The INS seeks to remove Mr. Jama to Somalia because it is "[t]he country in which [Mr. Jama] was born." 8 U.S.C. § 1231(b)(2)(E)(iv). The parties disagree, however, on whether the statute requires the INS to establish that Somalia will accept Mr. Jama's return prior to effecting his removal.

This disagreement is signifi- ***634** cant; if prior acceptance is required, the INS will be unable to return Mr. Jama to Somalia. This is because Somalia lacks a functioning central government, rendering it impossible for the INS to obtain Somalia's prior acceptance.

Mr. Jama cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them because they disregard the plain language of the statute itself, which is the "starting point in any question of statutory interpretation." *United States v. Milk*, 281 F.3d 762, 766 (8th Cir. 2002). Our careful review of the statute reveals that, as matter of simple statutory syntax and geometry, the acceptance requirement is confined to clause (vii), and does not apply to clauses (i) through (vi).

This statute well illustrates the maxim "*expressio unius est exclusio alterius*," or "expression of the one is the exclusion of the other." Congress inserted an acceptance requirement into steps one and two, and into the self-contained provisions that appear in clause (vii) of step three. Congress did not insert an acceptance requirement into the self-contained provisions that appear in clauses (i) through (vi). "Courts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit." *Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000). In other words, we believe that the "short answer" to Mr. Jama's assertion (that the INS must obtain prior acceptance before returning him to the country of his birth) is that "Congress did not write the statute that way." *See United States v. Naftilin*, 441 U.S. 768, 773 (1979). Whether it is politically wise, efficient, or considerate of the United States to remove an alien without the prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province.

Mr. Jama contends that this interpretation of step three nullifies the preceding provisions of the statute. We disagree. We reject, for example, Mr. Jama's suggestion that our plain reading of the statute, which permits the INS to return an alien to his country of birth without prior acceptance, wholly eviscerates the need to obtain a destination country's acceptance before returning its "subject, national or citizen." *See* 8 U.S.C. § 1231(b)(2)(D), (2)(E)(iv). An alien is not always a subject, national or citizen of the country in which he was born. We note, moreover, that between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused.

We also reject Mr. Jama's suggestion that, in the absence of any material difference between § 1231(b)(2) and its predecessor statute, 8 U.S.C. § 1253(a) (1994), this court must presume that Congress meant to incorporate and adopt the (as Mr. Jama sees it) "settled judicial construction" that reads the prior acceptance requirement into all clauses of the statute. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-99 (1979). Whether or not this presumption applies only to decisions by the United States Supreme Court or includes all judicial and administrative constructions of the statute is immaterial. *See Keene Corp v. United States*, 508 U.S. 200, 212 (1993); *Shapiro v. United States*, 335 U.S. 1, 16 (1947); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Under either standard, there exists no settled ***635** judicial construction of the provision in question. *See United States v. Powell*, 379 U.S. 48, 55 n.13 (1964); *Compare Tom Man*, 264 F.2d at 928 (prior acceptance required), *with In re Niesel*, 10 I.&N. Dec. 57, 59, 1962 WL 12904 (BIA 1962) (no prior acceptance required).

The dissenting opinion takes the view that *Niesel* addresses only the issue of an initial inquiry into whether a country will accept an alien, and thus does not bear on a country's final agreement to accept an alien. Our reading of

Niesel, however, convinces us that no such distinction exists in that case or under the statute. *Niesel* recognizes that certain portions of the statute (steps one and two, and clause (vii) of step three) require the INS's "preliminary inquiry" as to whether a country is willing to accept an alien prior to ordering the alien deported to that country, and that under the remaining portions of the statute, no such preliminary inquiry is required. *Niesel*, 10 I.&N. at 59. It does not follow from this that there exists some sort of statutorily-required "final inquiry" that applies to the deportation of every alien under every portion of the statute.

We note, moreover, that contrary to what the dissenting opinion suggests, the BIA did not abandon *Niesel's* holding in *In re Linnas*, 19 I.&N. Dec. 302, 1985 WL 56051 (BIA 1985). That case arose in New York, and the BIA, citing *Tom Man*, noted that "the language of [the statute] expressly requires, or has been *construed* to require, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'" *Linnas*, 19 I.&N. at 307 (emphasis added).

Finally, we note the dissenting opinion's reluctance to apply the words of the statute because to do so would not "accord with [the dissenting judge's] sense of liberty and justice." But it was Learned Hand himself who noted that it would be "most irksome to be ruled by a bevy of Platonic Guardians," even if he knew "how to choose them," which, he said, he assuredly did not. Learned Hand, *The Bill of Rights*, 73 (1958). Congress is free to fix the statute if it needs fixing, and Congress knows how to do so if it wishes.

III.

Having reviewed Mr. Jama's remaining arguments, we conclude that they are without merit. Accordingly, for the reasons stated, we reverse the district court's order granting the writ, and remand the case to the district court for the

entry of an order denying Mr. Jama's habeas petition under 28 U.S.C. § 2241.

BYE, Circuit Judge, dissenting.

I agree the district court and this court have jurisdiction to consider Mr. Jama's habeas petition. I disagree, however, that 8 U.S.C. § 1231(b)(2) allows our government to remove Mr. Jama to Somalia before a functioning central government has indicated it will accept him. Because I would affirm the district court's order granting the writ, I respectfully dissent.

For nearly a half century, the courts have held the United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien. *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958); *United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468, 468 (S.D. N.Y. 1956).

Forty-four years ago, Judge Learned Hand interpreted the statutory provisions at issue here and concluded there were no circumstances under which the statute allowed the United States to deport an alien unless the receiving country was "willing to accept" him. *United States ex rel. Tom* ***636** *Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959) (quoting 8 U.S.C. § 1253(a), the precursor to 8 U.S.C. § 1231(b)(2)). Judge Hand's interpretation of the statute subsequently became well-settled. *See Chi Sheng Liu v. Holton*, 297 F.2d 740, 743-44 (9th Cir. 1961); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960); *Matter of Linnas*, 19 I. & N. Dec. 302, 307, 1985 WL 56051 (BIA 1985) ("[A] country selected under any of the three steps [set forth in § 1253(a)] *must* indicate it is willing to accept a deported alien into its 'territory'") (emphasis added); *see also Amanullah & Wahidullah v. Cobb*, 862 F.2d 362, 365-66 (1st Cir. 1988) (interpreting § 8 U.S.C. § 1227(a)(2), a "parallel" provision to § 1231(b)(2) which applies to excludable rather than removable aliens, and holding the statute requires a country to accept an alien prior to deportation).

The long-standing policy and, until recently, practice of the INS have been consistent with Judge Hand's interpretation. *See* 8 C.F.R. § 241.4(k)(1)(i) ("[T]he INS] shall conduct a custody review for an alien . . . where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien"); INS Operating Instruction 243.1(c)(1) ("Except for a limited class of aliens deported to contiguous territory, deportation cannot be effected until travel documentation has been obtained" and further providing for travel documents to be obtained from the country willing to accept an alien) (App. 103); *see also* 2 *Immigration Law Serv.* § 17.433 ("[D]eportation under Step Three is dependent upon the country in question being willing to accept the deportee into its territory.")

Each time Congress amended the INA or re-enacted the statutory provisions which now appear at § 1231(b)(2) without making any material changes to the precursor statute, it adopted the well-settled construction given the precursor by the courts and the INS. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well"). The majority cites *In re Niesel*, 10 I. & N. Dec. 57, 59, 1962 WL 12904 (BIA 1962) for the proposition there was no settled judicial construction of the disputed provisions. I disagree. "*Niesel* simply held that the government appropriately disregarded a petitioner's designation and lawfully chose another country without *first inquiring* whether that country would accept the petitioner. Thus, *Matter of Niesel* addressed only the issue of an *initial* inquiry, not final acceptance of the country to which a person would be returned." *Ali v. Ashcroft*, 213 F.R.D. 390, 403 (W.D. Wash. 2003) (internal citations omitted) (emphasis in original).

Even if *Niesel* had held no final acceptance was required, the Board of Immigration Appeals clearly abandoned that position in *Linnas*.

We are not to interpret statutory text in a manner which leads to absurd results. *Rowley v. Yarnall*, 22 F.3d 190, 192 (8th Cir. 1994). The majority explains its interpretation of the statute in part by noting "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Ante* at 7. That is easier said than done. A government not willing to accept an alien will simply refuse his admittance into its country. Thousands of deportees from China, Viet Nam, Cambodia, Cuba and other countries continue to be detained in the United States because those countries are unwilling to accept them. *See* Donald ***637** M. Kerwin, Throwing Away the Key: Lifers in INS Custody, 75 Interpreter Release 649, 650-52 (1998). Those deportees can attest to the practical difficulty, if not impossibility, of acting anyway when a request is refused.

As a practical matter, then, the task of removing an alien to a country which has not accepted him will only be accomplished and the majority's construction of the statute will only be implicated when there is no functioning government to refuse the alien's acceptance, currently the case in Somalia. The absurdity of such a construction lies in the fact we require a functioning central government as an "essential aspect" of a "country" to which an alien can be deported. *Linnas*, 19 I. & N. Dec. at 307, 1985 WL 56051; *see also Ademi v. INS*, 31 F.3d 517, 521 (7th Cir. 1994) (recognizing it is impossible to seek acceptance from a country which has ceased to exist); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) ("[A]ny place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' . . . to which a deportable alien may be sent"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting a

"country" with the meaning of the statute requires a functioning government with undisputed control over a well-defined geographical area).

"Learned Hand warned that, absent order, liberty becomes license, ultimately leading to the denial of liberty. In a world of unbridled license, the strong do what they will and the weak suffer what they must." Remarks of Attorney General John Ashcroft, Eighth Circuit Judges Conference (Aug. 7, 2002). I fear if we "act anyway" by deporting Mr. Jama to Somalia, we abuse our great strength at the expense of the weak. With this change in policy, we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords, and without a central government. By doing so, I fear we abandon order and risk the doom of liberty.

Because the government's recent disregard of a well-settled and accepted construction of § 1231(b)(2) does not accord with my sense of liberty or justice, I respectfully dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Full name and prisoner number of Petitioner,
vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Name of Respondent.

PETITION FOR WRIT OF HABEAS CORPUS
PERSONS IN FEDERAL CUSTODY
UNDER TITLE 28 USC SECTION 2241

Civil No. _____

[Received by Mail: June 28, 2001]

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the U. S. District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each question. (If a particular question is not applicable, that should be specifically noted.) If necessary, petitioner may finish the answer to a particular question on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, the false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is submitted in forma pauperis, it shall include the Application To Proceed In Forma Pauperis (AO 240-10/96). Petitioner should be mindful of the changes in IFP procedures effected by the "Prison Litigation Reform Act".

When the petition is completed, the original and one copy together with a JS-44 Civil Cover Sheet must be mailed to: Office of the Clerk, United States District Court, 708 Federal Building, 316 North Robert Street, St. Paul, MN 55101. The petition must be accompanied by either (a) the full filing fee of $5.00, make check payable to U.S. District Court or (b) a properly completed IFP application (with the initial partial filing fee, if required by 28 U.S.C. Section 1915(b) (1).)

1. Place of detention: Sherburne County Jail

2. Name and location of court which imposed sentence: Board of Immigration Appeals

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) A71-689-585

4. The date upon which sentence was imposed and the terms of the sentence:

(a) Current

5. Check whether a finding of guilty was made:

(a) After a plea of guilty: N/A

(b) After a plea of not guilty: N/A

(c) After a plea of nolo contendere: N/A

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) A jury: N/A

(b) A judge without a jury: Review/Opinion

7. Did you appeal the judgment of conviction or the imposition of sentence? In Immigration Court

8. If you answered "yes" to Item 7, list:

(a) The name of each court to which you appealed:

i. N/A

ii. N/A

iii. N/A

(b) The result in each such court to which appealed:

i. Deportation!

ii.

(c) The date of each such result:

i. N/A

ii. N/A

iii. N/A

(d) If known, citations of any written opinions or orders entered pursuant to such results:

i. N/A

ii. N/A

iii. N/A

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully. Each ground for relief should be described separately, and each ground should include (1) a concise statement of the relevant facts and (2) a brief description of the legal principle(s) on which it is based.

Ground 1: My Country has no Government, is unstable, and all my Family is in the United States!

Ground 2: N/A

Ground 3: N/A

Additional grounds may be set forth on an attached page.

10. Have you filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States Code, or other applications, Petitions or motions with respect to this conviction? No.

11. If you answered "yes" to Item 10, list with respect to each petition, motion or application:

(a) The specific nature thereof:

i. N/A

ii. N/A

iii. N/A

(b) The name and location of the court in which each was filed:

i. N/A

ii. N/A

iii. N/A

(c) The disposition thereof:

i. N/A

ii. N/A

iii. N/A

(d) The date of each such disposition:

i. N/A

ii. N/A

iii. N/A

(e) If known, the citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

12. If you did not file a motion under Section 2255 of Title 28, United States Code, or if you filed such a motion and it was denied, then for each ground raised here, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

If there are additional grounds, attach a separate page.

13. Has any ground set forth in Item 9 (above) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under Section 2255 of Title 28, United States Code, or any other petition, motion or application? N/A

14. If you answered "yes" to Item 13, identify all of the proceedings in which each such ground was raised:

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

If there are additional grounds, attach a separate page.

15. Have any of the grounds for relief presented in this petition been raised in any prison grievance procedure or administrative remedies procedure? N/A

16. If you answered "yes" to Item 15, then for each ground that has been raised describe (1) each step that was taken to resolve the claim through a grievance procedure or administrative remedies procedure and (2) the disposition of the claim at each step.

Ground 1: N/A

Ground 2: N/A

Ground 3: N/A

(Copies of any written materials pertaining to grievance procedures or administrative remedies procedures – including statements of the claim(s) presented and responses received – should be attached to this petition.)

17. Are there any administrative remedies available for any of your grounds for relief that have not been exhausted? N/A

18. If you answered "yes" for Item 17, then for each such unexhausted ground for relief, explain why the available administrative remedies were not fully exhausted. N/A

19. If you were represented by an attorney during any of the following procedures, then state the name and address of such attorney(s):

(a) Your appearance before a United States Commissioner?

Name N/A

Address N/A

(b) Your arraignment and plea?

Name N/A

Address N/A

(c) Your trial, if any?

Name N/A

Address N/A

(d) Your sentencing?

Name N/A

Address N/A

(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence?

Name N/A

Address N/A

(f) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

Name N/A

Address N/A

20. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information? (see instructions, page 1 of this form) yes

/s/ Keyse Jama

Signature of Petitioner

Keyse G. Jama, being first sworn under oath, presents that he/she has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his/her knowledge and belief.

/s/ Keyse Jama

Signature of Affiant

SUBSCRIBED AND SWORN to before me this

_____ day of _____, _____

(month) (year)

_____

Notary Public

My commission expires:

_____

(Month, Day, Year)

NOTARIZATION IS NOT NECESSARY IF THE FOLLOWING STATEMENT IS COMPLETED:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6/10/01
(Date)

/s/ Keyse Jama
(Signature)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

Civil File No. 01-1172 (JRT/AJB)

REPORT AND
RECOMMENDATION

Jeffrey J. Keyes and Kevin M. Magnuson, Briggs and Morgan, 2200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota, 55402, for Petitioner.

Lonnie F. Bryan, Assistant U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, 55415, for Respondent.

ARTHUR J. BOYLAN, United States Magistrate Judge

Petitioner commenced this action by filing an application for habeas corpus relief pursuant to 28 U.S.C. § 2241. He is asking the Court to enter an order that would bar Respondent, the United States Immigration and Naturalization Service, ("INS"), from removing him to Somalia. He claims that Respondent cannot legally deport him to Somalia, because that country has not agreed to accept him.

Respondent has filed an answer, contending that this action should be dismissed for lack of jurisdiction. Respondent further contends that, in any event, Petitioner can legally be removed to Somalia, even though there has been no indication that he will be accepted there.

The matter has been referred to the undersigned for report and recommendation under 28 U.S.C. § 636 and Local Rule 72.1(c). For the reasons discussed below, I conclude that (a) Petitioner's habeas corpus petition can properly be entertained here, and (b) Petitioner cannot legally be removed to Somalia until that country agrees to accept him. It will therefore be recommended that habeas corpus relief be granted to Petitioner in the form of an order that bars Respondent from removing him from the United States until Somalia, or some other country, has agreed to accept him.

I. BACKGROUND

Petitioner was born in Somalia in 1979. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, Petitioner and his family applied for admission to the United States as refugees. Their application was granted, and Petitioner arrived in the United States on or about February 27, 1996. He came to Minnesota shortly thereafter. Petitioner settled in the Twin Cities area, where he worked and went to school. He never became a citizen or permanent resident alien, but simply retained his refugee status.

In June of 1999, Petitioner got into a fight with another man. The man suffered a substantial injury, and Petitioner was charged with assault. In September 1999, he pleaded guilty to third degree assault – a felony under Minnesota law – and was sentenced to one year and one day in prison. His prison sentence was stayed and he was placed on probation for three years. He violated the conditions of his probation, so he ended up serving time in state prison.

Because of Petitioner's felony conviction, the INS initiated removal proceedings against him in late 1999. When he completed his state prison term in 2000, he was taken into INS custody. Petitioner attempted to avoid removal by filing an application for asylum, claiming that he would be persecuted if he returned to Somalia. He raised the

same argument in a separate application for relief under the "Convention Against Torture." He also filed an application seeking permanent resident alien status.

In August 2000, an immigration judge conducted a hearing to determine whether Petitioner should be removed from the United States. The immigration judge later issued a decision, in which he held that Petitioner was removable because he had been convicted of a "crime of moral turpitude." The immigration judge also rejected Petitioner's various applications for asylum and permanent resident alien status.[1] Petitioner did not request that he be sent to any particular country, so the immigration judge directed the INS to remove him to his homeland -- Somalia.

Petitioner appealed the immigration judge's decision to the Board of Immigration Appeals, but his removal order was affirmed. He never sought judicial review of the INS removal order, and he concedes, (at least implicitly), that the removal order has become final. On May 25, 2001, the INS formally notified Petitioner that the removal order would be executed.

As far as the Court can tell, Petitioner has been held by the INS at all times since he completed his state prison sentence in June 2000. The INS detained him for several

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[1] The immigration judge noted that Petitioner had been arrested numerous times before his assault conviction, and that he had compiled an extensive disciplinary record while serving his state prison sentence. According to the immigration judge, Petitioner "was subjected to numerous violation reports, which ultimately resulted in him losing all his good time in prison, and being required to serve the entirety of his sentence. [Petitioner] was transferred from lower security institutions up to Oak Park Heights Prison, which is the highest security classification prison in the Minnesota System." (Government Exhibits, [Docket No. 8], p. 177.) Respondent has submitted various prison records that tend to corroborate the immigration judge's suggestion that Petitioner was a very hostile inmate. (Government Exhibits, pp. 115-39.)

months at the Minnesota Correctional Facility in Rush City, Minnesota, but when he filed his current habeas corpus petition, on June 28, 2001, he was being detained at the Sherburne County Jail in Elk River, Minnesota. It is unclear whether Petitioner is still in custody in Sherburne County, or whether he has been transferred to some other detention facility.

It is important to note that Petitioner is not presently challenging the validity of his removal order; nor is he challenging his current INS detention *per se*. Instead, Petitioner is challenging the manner in which the INS is planning to execute the removal order. More specifically, Petitioner is claiming that the INS should not be allowed to physically transport him to Somalia, and drop him off there, unless and until some proper governmental authority in Somalia has agreed that he can be left there.

According to Petitioner, there is no proper governmental authority in Somalia that can approve his return to that country at this time, because Somalia presently has no government. Respondent acknowledges that "Somalia has been without a functioning central government since 1991." (Respondent's Return, [Docket Nos. 5, 6 & 7], p. 6.) Moreover, neither party suggests that Somalia is likely to have a functioning central government any time soon.[2]

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[2] According to Respondent:

> On June 15, 2000 in Arta, Djibouti more than 900 delegates, representing various clans and a wide spectrum of Somali society, beg[a]n establishing a central and unified government in Somalia. In July 2000, the delegates adopted a charter establishing a transitional government including an elected assembly and president. Although this Transitional Government continues to pursue unification, Somaliland and Puntland [two major provinces] do not currently recognize the transitional government.

(Respondent's Return, p. 7.)

Respondent claims that there is no need to obtain anyone's consent before sending Petitioner back to Somalia, and that it has a plan to repatriate Petitioner, which can be executed without the acquiescence of anyone in Somalia. That plan, as explained in Respondent's Return, is as follows:

> The INS intends to give Petitioner a choice of four cities in Somalia where he can be dropped off. After Petitioner has selected a city to land in, the INS intends to prepare, and issue to him, a "Form I-269 (Certificate of Identity) which is used when a passport travel document is unavailable." (Respondent's Return, p. 8.) The INS would then prepare a travel itinerary to return Petitioner to Somalia. If the INS follows its past practice, (and there is no indication that it will not), Petitioner probably would be put on a plane with two INS deportation officers and sent to Sweden. From there, Petitioner and the two deportation officers would fly to the City of Dubai, in the United Arab Emirates. The deportation officers would then put Petitioner on another flight bound for the Somali city of his choice, and Petitioner would travel that final leg of the journey alone. The deportation officers apparently would stay in Dubai long enough to satisfy themselves that Petitioner was not returned to Dubai on a flight back from Somalia. (Respondent's Exhibits, [Docket No. 8], pp. 243-44.) They would then return to the United States, presumably without any knowledge of Petitioner's fate upon his arrival in Somalia.

Respondent represents that the foregoing plan has been used to return at least 14 Somalis to their homeland during the past few years, and that the plan can be used to successfully remove Petitioner. Moreover, Respondent apparently is confident that Petitioner will be relatively safe and secure upon returning to Somalia – assuming he chooses to return to a city controlled by members of his own clan. (Respondent's Return, p. 6.)

Petitioner contends that the INS has grossly underestimated (or else understated) the danger that he would face if he were returned to Somalia. He cites news reports of people being killed recently "at the very airport where the INS seeks to drop [him]." (Petitioner's Memorandum, [Docket No. 11], p. 3.) However, Petitioner readily acknowledges that the outcome of this case should not be determined by weighing and deciding how much danger might await him in Somalia. Instead, Petitioner contends that the issue to be resolved here is whether it is legal for the INS to drop him off (quite literally) in Somalia, without first obtaining some type of consent, approval or acceptance from some Somali governmental authority. This appears to be an accurate description of the dispositive issue in this case; and the Court finds that the issue should be resolved in Petitioner's favor.

II. JURISDICTION

Before reaching the legal issue raised by Petitioner, it is first necessary to determine whether this case can properly be entertained in a federal district court. Respondent contends that this action should be summarily dismissed for lack of jurisdiction, and that contention must be resolved before Petitioner's substantive claim can be addressed on the merits.

Respondent's jurisdictional argument is based on 8 U.S.C. § 1252(g), which reads as follows:

> "(g) Exclusive Jurisdiction.
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act."

Respondent contends that this statute forbids federal district courts from exercising jurisdiction in any type of action – including a habeas corpus action – brought by an alien who is attempting to challenge the execution of a removal order. The instant Petitioner is challenging the INS's execution of the removal order entered against him, and therefore, Respondent argues, § 1252(g) deprives the Court of jurisdiction in this matter.

In *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999) ["*AADC*"], the Supreme Court concluded that § 1252(g) does indeed deprive federal courts of jurisdiction over actions challenging INS discretionary decisions in the three areas listed in the statute – (1) decisions involving the commencement of removal proceedings, (2) decisions made during the adjudication of removal cases, and (3) decisions pertaining to the execution of removal orders. According to Respondent, *AADC* clearly confirms that § 1252(g) bars Petitioner's current challenge to the INS's execution of his removal order.

Petitioner disagrees. He points out that *AADC* was not a habeas corpus case. Therefore, he argues, it is not controlling here.

At least the premise of Petitioner's argument is certainly correct – *AADC* was <u>not</u> a habeas case. It was a civil lawsuit brought by a group of aliens who claimed that the INS was using selective enforcement tactics to harass them and deport them based on their nationality. The plaintiffs in *AADC* wanted the federal district court to enter an injunction and declaratory judgment that would end the INS's allegedly discriminatory practices. *AADC*, 525 U.S. at 473-75. Thus, Petitioner is correct when he contends that *AADC* did not directly address the specific jurisdictional issue presented here – namely, whether § 1252(g) eliminates *habeas corpus* review of INS actions pertaining to the execution of removal orders. The resolution of this issue, Petitioner contends, is

governed by the Supreme Court's more recent decision in *I.N.S. v. St. Cyr*, 121 S.Ct. 2271 (2001). The Court agrees.

In *St. Cyr*, a resident alien wanted the INS to waive a removal order that had been entered against him because he had been convicted of a crime. The INS contended that two laws enacted in 1996, the Anti-terrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act, ("IIRIRA"), took away the Attorney General's authority to waive removal orders. The alien, St. Cyr, filed a habeas corpus action claiming that the Attorney General still retained such authority, (and, presumably, that such authority should be exercised in his favor).

Before reaching the merits of St. Cyr's claims, the Supreme Court had to decide whether those claims could properly be raised in a habeas corpus proceeding. The Attorney General argued that habeas review was barred by four sections of the new 1996 laws – section 401(e) of AEDPA, and three sections of IIRIRA – 8 U.S.C. §§ 1252(a)(1), 1252(a)(2)(C) and 1252(b)(9). *St. Cyr*, 121 S.Ct. at 2278.[3] Even though all four of these laws broadly bar

[3] The first of these new laws (AEDPA § 401(e)) repealed 8 U.S.C. § 1105a(a)(10), which had provided that "any alien held in custody pursuant to an order of deportation may obtain review thereof by habeas corpus proceedings." *See id.* at 2284. The second new law, 8 U.S.C. § 1252(a)(2)(C), provides that "[j]udicial review of a final order of removal" is available only in a federal circuit court of appeals. *See id.* at 2285. The third new law, 8 U.S.C. § 1252(b)(9), similarly indicates that "[j]udicial review of all questions of law and fact, including interpretations and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section" – i.e., only in the court of appeals. Finally, 8 U.S.C. § 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" certain crimes specified by law. *See St. Cyr*, 121 S.Ct. at 2284-85.

"judicial review" of INS removal orders, the Supreme Court concluded that St. Cyr could still raise his legal arguments pertaining to his removal order in a habeas corpus petition filed in a federal district court.

In reaching that conclusion, the Supreme Court was guided by the "strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." 121 S.Ct. 2278. The Court also noted "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 2290, quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987). Finally, the Court emphasized that "some 'judicial intervention in deportation cases' is unquestionably 'required by the Constitution.'" *St. Cyr*, 121 S.Ct. at 2279, quoting *Heikkila v. Barber*, 345 U.S. 229, 235 (1953). Because habeas corpus appeared to be the only means by which St. Cyr could secure "judicial intervention" in his case, the Court found that a serious constitutional problem would exist if the various new laws cited by the INS actually did bar St. Cyr from seeking habeas corpus relief. *St. Cyr*, 121 S.Ct. at 2282. In the words of the Court, "a serious Suspension Clause[4] issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn . . . the power [to issue the writ of habeas corpus] from federal judges and provided no substitute for its exercise." *Id.*

Applying these same principles here, this Court finds that § 1252(g) does not bar the instant Petitioner from seeking habeas corpus relief under 28 U.S.C. § 2241. In this case, as in *St. Cyr*, the statute at issue does not expressly purport to divest the federal district courts of habeas corpus jurisdiction.

[4] The "Suspension Clause" is Article I, Section 9, Clause 2 of the Constitution, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

Section 1252(g) does not specifically mention habeas corpus review, and it should not be understood to eliminate such review merely by implication. *See Shah v. Reno*, 184 F.3d 719, 723-24 (8th Cir. 1999); *Gavilan-Cuate v. Yetter*, 94 F. Supp. 2d 1039, 1040-42 (D. Minn. 2000) (emphasizing that AEDPA and IIRIRA could not repeal federal habeas corpus jurisdiction "by mere implication"), *rev'd on other grounds*, 276 F.3d 418 (8th Cir. 2002).

Although the jurisdiction limiting language used in § 1252(g) is certainly broad, ("no court shall have jurisdiction to hear any cause or claim"), it does not necessarily encompass habeas corpus jurisdiction. As the Supreme Court pointed out in *St. Cyr*, "[i]n the immigration context, 'judicial review' and 'habeas corpus' have historically distinct meanings." 121 S.Ct. at 2285. Here, as in *St. Cyr*, the statute at issue appears to be aimed only at "full, nonhabeas review," and does not "explicitly mention[] habeas, or 28 U.S.C. § 2241." *Id.* at 2286. The Court finds that § 1252(g), like the statutes examined in *St. Cyr*, is not worded with the clarity and specificity needed to take away the constitutionally-protected, and presumptively-favored, right to habeas corpus review.

Moreover, if Respondent's interpretation of § 1252(g) were adopted, and the remedy provided by the federal habeas statutes were therefore unavailable to Petitioner, it appears that he would have no opportunity to seek judicial review of his current claim. Respondent has not suggested that Petitioner might have some other non-habeas means of bringing his current claim before a federal judge, and the Court is not aware of any other option. The absence of any non-habeas remedy for Petitioner's present legal argument further undermines Respondent's interpretation of § 1252(g). *See St. Cyr*, 121 S.Ct. at 2279 ("[a] construction of the [statutes] at issue that would entirely preclude review of a pure question of law by any court would give rise to serious constitutional questions").

Depriving Petitioner of any federal judicial remedy would be especially objectionable in this particular case, because Petitioner is not challenging any factual or discretionary determination made by the INS. Instead, he is attempting to raise a purely legal issue – i.e., whether federal law allows the INS to send a removable alien to a country that has not agreed to accept him. As a general rule, such purely legal issues may properly be raised and decided in habeas proceedings. *St. Cyr*, 121 S.Ct. at 2283 ("[i]n case after case, courts [have] answered questions of law in habeas proceedings brought by aliens challenging Executive interpretations of immigration laws").[5]

Even before *St. Cyr*, some circuit courts had determined that recent amendments to the federal immigration laws could not be interpreted to eliminate federal habeas review for aliens facing removal. *See Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Henderson v. I.N.S.*, 157 F.3d 106, 117-22 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).[6] After *St. Cyr*, there can be little doubt that the new laws, including § 1252(g), do not eliminate federal habeas review of the legal claims of removable aliens. As the First Circuit Court of Appeals recently put it: "In light of *St. Cyr*, INS's principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation – is a dead letter." *Carranza v. Immigration and Naturalization Service*, No. 00-2365 (1st

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[5] Because the key substantive issue raised by Petitioner is a legal issue, this case is distinguishable from other alien habeas cases that have been dismissed for lack of jurisdiction. *See, e.g., Sol v. I.N.S.*, 274 F.3d 648, 651 (2nd Cir. 2001) ("fact-intensive review is vastly different from what the habeas statute plainly provides: review for statutory or constitutional errors").

[6] The Supreme Court noted these decisions, without voicing any disapproval of them, in *AADC*. *See AADC*, 525 U.S. at 480, n.7.

Cir. Jan. 17, 2002), 2002 WL 47139, at *6. The court agrees with this assessment of Respondent's jurisdictional argument based on § 1252(g), and adopts it here. I further agree with the First Circuit's conclusion that "[f]ederal courts . . . retain subject matter jurisdiction over habeas petitions brought by aliens facing removal to the extent that those petitions are based on colorable claims of legal error, that is, colorable claims that an alien's statutory or constitutional rights have been violated." *Id.* at *5.

In sum, while § 1252(g) generally eliminates judicial review of removal orders against aliens, it does not bar federal courts from entertaining habeas corpus petitions brought by criminal aliens who are attempting to challenge removal proceedings on legal or constitutional grounds. It follows that Petitioner's current claims, challenging the legality of the INS's plan to remove him, can properly be entertained in a habeas corpus petition brought under 28 U.S.C. § 2241.

III. THE MERITS OF PETITIONER'S HABEAS CLAIM

8 U.S.C. § 1231(b)(2) establishes a three-step selection process for determining where a removable alien should be sent after a final removal order has been entered against him. First, the alien may designate a country to which he wants to be sent; and if he does so, the Attorney General will send him there – subject to certain limitations and restrictions. 8 U.S.C. § 1231(b)(2)(A), (B) and (C). If the alien does not designate a country to which he wants to be sent, or if he designates a country that is statutorily unacceptable, (*see* 8 U.S.C. § 1231(b)(2)(B) and (C)), the selection process proceeds to the next step. At step two, the INS is directed to send the alien back to the country where he is a citizen – if that country indicates that it will accept him. The step two statute, § 1231(b)(2)(D), says that –

> "The Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country –
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.

Step three of the removal process is set forth at 8 U.S.C. § 1231(b)(2)(E), which provides as follows:

> (E) Additional removal countries
>
> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> (i) The country from which the alien was admitted to the United States.
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.
>
> (iv) The country in which the alien was born.
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born.
>
> (vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

In this case, the INS contends (and Petitioner apparently agrees) that Petitioner's removal destination is not determinable at step one of the selection process, because Petitioner did not designate a removal destination in a proper and timely manner. It is also apparent that a removal destination cannot be determined at step two of the selection process, because the "government of the country" of which Petitioner is a "subject, national, or citizen," (namely Somalia), has not informed the INS that it "will accept [Petitioner] into the country." 8 U.S.C. § 1231(b)(2)(D)(i). Indeed, the parties agree that the "country of Somalia" has no functioning government that could accept Petitioner.[7]

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[7] The parties strongly disagree about whether Somalia is in fact a "country" at all. Respondent says it is; while Petitioner says it is not. The Court does not find it necessary to resolve that semantical debate in order to decide whether Petitioner is entitled to relief. For present purposes, the Court will accept Respondent's assertion that Somalia is a country. The fact remains, however, that Somalia has no functioning government, so the "government of the country" to which the INS wants to send Petitioner has not expressed, (and cannot express), a willingness to accept him.

In a footnote in its initial Return, Respondent suggests that perhaps Petitioner could be removed to Somalia at step two, (i.e., pursuant to § 1231(b)(2)(D)), even though no government in Somalia has expressed a willingness to accept him. (Return, p. 28, n. 16.) Respondent seems to believe that if a country has no government, then the government acceptance requirement is simply "not relevant." (*Id.*) As Petitioner has aptly noted, this is an "extraordinary interpretation" of the statute. (Petitioner's Memorandum, p. 10.) Respondent has offered no logic or authority to support its proposition that the governmental acceptance requirement in § 1231(b)(2)(D) can simply be ignored where a country has no government. The Court rejects that proposition.

Thus, the Court finds that Petitioner's removal destination must be determined at step three of the selection process, which means that § 1231(b)(2)(E) is controlling. Respondent contends that Petitioner can be removed to Somalia pursuant to § 1231(b)(2)(E)(iv), which allows the INS to remove an alien to "[t]he country in which the alien is born." Petitioner argues that the INS cannot send him to Somalia pursuant to § 1231(b)(2)(E)(iv), (or otherwise), unless the government of Somalia first agrees to accept him back into that country. Again, the Court agrees with Petitioner.[8]

The acceptance requirement included at step two of the selection process, (§ 1231(b)(2)(D)), would be rendered all but meaningless if the INS could send an alien back to the country in which he was born without obtaining that country's consent. As Petitioner points out, (and Respondent does not deny), an alien will almost always be a "subject, national or citizen" of the country in which he is born. Therefore, under Respondent's interpretation of § 1231(b)(2)(E)(iv), the acceptance requirement at step two of the selection process, (§ 1231(b)(2)(D)), could be easily circumvented in just about every case. If an alien could not be returned to the country of which he is a "subject, national or citizen" because that country had not agreed to accept him, then, under Respondent's interpretation of § 1231(b)(2)(E)(iv), the INS could still return the alien to that country, (even without that country's acceptance), if that were the country where he had been born. Under

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[8] The Court rejects Respondent's suggestion that Petitioner is somehow attempting to "create a private cause of action" for himself out of § 1231(b)(2)(E). (*See* "Reply of Respondent," [Docket No. 15], pp. 7-9.) It is Respondent who contends that § 1231(b)(2)(E) is controlling here, and that it provides the legal authority for its plan to remove Petitioner to Somalia. Petitioner is merely opposing Respondent's contention, arguing that § 1231(b)(2)(E) does not authorize Respondent to send him to Somalia without acceptance by a Somali government.

Respondent's reading of the statute, the acceptance requirements of § 1231(b)(2)(D) could be evaded whenever an alien was born in a country of which he is a subject, national or citizen – which is almost always the case. Congress could not have intended for § 1231(b)(2)(E)(iv) to essentially eliminate the acceptance requirement of § 1231(b)(2)(D), by allowing the INS to avoid that requirement in virtually every case.

Furthermore, all of the relevant case law suggests that an alien cannot be removed to another country, including the country of his birth, unless that country has agreed to accept him. The case law uniformly indicates that the acceptance requirement set forth in § 1231(b)(2)(E)(vii), (allowing removal to "another country whose government will accept the alien into that country"), was meant to apply to all of the clauses of § 1231(b)(2)(E), including § 1231(b)(2)(E)(iv).

The leading case on this issue appears to be *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2nd Cir. 1959) ("*Tom Man*"). In that case, the INS was attempting to deport an alien to China. At the time, the United States did not have diplomatic relations with the country known as "Mainland China" or "Communist China," but the INS contended that the alien could properly be sent there, even though there was no indication that he would be accepted when he arrived there. The court in *Tom Man* considered whether the alien could be returned to Mainland China pursuant to 8 U.S.C. § 1253(a)(3), which was the statutory predecessor of § 1231(b)(2)(E)(iv). Section 1253(a)(3) allowed the INS to deport an alien "to the country in which he was born," if the country of which he was a "subject, national or citizen" did not agree to accept him. Section 1253(a)(3) did not expressly include an acceptance requirement, just as the currents § 1231(b)(2)(E)(iv) does not expressly include such a requirement. However, § 1253(a)(7), the last subdivision of § 1253(a), did include an acceptance requirement, just as § 1231(b)(2)(E)(vii) does now.

In *Tom Man*, the court concluded that deportation under any of the subdivisions of § 1253(a) "is subject to the condition expressed in the seventh subdivision; i.e., that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. Thus, the court held that the alien could not be deported to Mainland China, pursuant to § 1253(a)(3) or otherwise, unless there was a "mutual agreement between that 'country' and ourselves.'" *Id.*

Tom Man is not an anomaly; other courts have also concluded that the INS cannot deport an alien to a country that has not agreed to accept him. In *Lu v. Rogers*, 164 F. Supp. 320, 321 (D.D.C. 1958), *aff'd* 262 F.2d 471 (D.C. Cir. 1958), the court concluded that 8 U.S.C. § 1253(a) "require[d] a determination that the country to which the alien is to be sent is willing to accept him" and that such determination "must be made prior to the time of the deportation." The Court ordered that the Attorney General would be "restrained from apprehending and deporting the plaintiff unless prior expression of willingness to accept him has been received from communist China to which it is proposed to deport him." *Id.* at 322. Similar decisions can be found in *United States ex rel. Wong Kan Wong v. Esperdy*, 197 F. Supp. 914, 917 (S.D.N.Y. 1961) ("unless and until the respondent (the government) makes preliminary inquiry and . . . receives an expression of 'willingness to accept,' the relator [alien] may not be deported to the mainland of China"), and *Hom Sin v. Esperdy*, 209 F. Supp. 3, 4 (S.D.N.Y. 1962) (recognizing that "deportation may not be effected unless the [removal destination] country is willing to accept [the deportable alien] into its territory").

It must be acknowledged that all of the relevant cases are quite old, and that all of them interpreted an earlier and somewhat different version of the statute that is now § 1231(b)(2). Furthermore, those cases are factually different because they involved aliens who were slated to be deported to a country whose government was not formally recognized

by the United States, (China), while in this case we have a country that has no government at all, (Somalia). Nevertheless, the various Chinese deportation cases cited above are directly relevant to the issue presented here, i.e., whether an alien can be removed to a country that has not yet agreed to accept him. Those cases clearly indicate that an alien cannot be sent to a country that has not agreed, in advance, to take him. Moreover, Respondent, in 50 pages of briefing, has not cited a single case in which a federal court has sanctioned the removal of a legally-admitted alien to a country that has not agreed to accept him. Thus, the Court finds that § 1231(b)(2) does not authorize the INS to remove Petitioner to any country that has not agreed to accept him.

IV. CONCLUSION

For the reasons discussed above, the Court concludes that (a) Petitioner's current claim for relief can properly be raised and adjudicated in a habeas corpus proceeding, notwithstanding the jurisdictional restrictions of 8 U.S.C. § 1252(g); and (b) Petitioner cannot be removed to a country unless some governmental authority in that country agrees to accept him. The conclusion reached on the jurisdictional issue is based primarily on the Supreme Court's recent decision in *St. Cyr*. The conclusion reached on Petitioner's substantive claim for relief is based on a construction of 8 U.S.C. § 1231(b)(2) that is consistent with the case law interpreting that statute's predecessor, 8 U.S.C. § 1253(a).[9]

It bears repeating that the Court has not been asked to review the legality or validity of the removal order entered against Petitioner. That order remains in full force and

[9] Petitioner has presented additional arguments in support of his substantive claim for relief that are based on INS administrative regulations and the Constitution's Due Process Clause. (Petitioner's Memorandum, pp. 18-23.) The Court has not found those arguments to be persuasive, and does not adopt them here.

effect. Nor has the Court been asked to review the legality or validity of Petitioner's current and/or future detention by the INS.[10] That issue has not been presented here and will not be addressed here.

It also bears repeating that the Court is not second-guessing any factual determination made by the INS, including the type of danger that Petitioner might face if he were returned to Somalia. Nor is the Court second-guessing any discretionary determination that the INS has made in this matter. The issue presented and resolved in this case is purely a legal one: Do the federal immigration laws permit the INS to deposit a removable alien in a country that has not agreed to accept him? The INS has not convinced this Court that the law, specifically 8 U.S.C. § 1231(b)(2)(D)-(E), authorizes the INS to do what it intends to do. Only that legal issue has been decided here.

Finally, we must consider the exact nature of the relief that should be granted in this case. Customarily, of course, a writ of habeas corpus directs the named respondent to release the petitioner from custody. Such relief, however, would not be appropriate here. Petitioner has not asked to be released from custody, and he has not shown that he is entitled to be released. Instead, Petitioner has asked only that the INS be ordered not to remove him without first obtaining confirmation from a government that he will be accepted. The Court has concluded that Petitioner should be granted the relief he has requested, and the remedy available under the federal habeas corpus laws is broad enough and flexible enough to provide such relief.[11] It will therefore be

[10] *See* Petitioner's Memorandum, p. 29 ("Petitioner does not challenge the 90 day detention [period for effecting removal] but challenges the physical removal in violation of the statute").

[11] In *St. Cyr*, for example, the habeas petitioner was not seeking release from custody *per se* he was only seeking an order that would compel the INS to consider whether he should be granted a discretionary waiver of removal. By granting St. Cyr's habeas petition, the courts presumably

recommended that Respondent be ordered not to remove Petitioner to another country, unless the government of that country first agrees to accept him.

V. RECOMMENDATION

Based on the foregoing, and all the files, records and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus, (Docket No. 1), should be GRANTED; and

2. Respondent should be ordered not to remove Petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him.

DATED: February 1, 2002

/s/

ARTHUR J. BOYLAN

United States
Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this report and recommendation by filing with the Clerk of Court and serving all parties, within ten days after being served with a copy thereof, written objections which specifically identify the portions of the proposed findings, recommendations or report to which objection is being made, and a brief in support thereof. A party may respond to the

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did not set him free, but merely directed the INS to consider whether he should be granted a waiver. *See also Martin v. Gerlinski*, 133 F.3d 1076, 1081 (8th Cir. 1998) (granting habeas relief in the form of an order directing the federal Bureau of Prisons to consider whether petitioner should be allowed early release pursuant to 18 U.S.C. § 3621(e)(2)(B)).

objecting party's brief with ten days after service thereof. All briefs filed under this rule shall be limited to ten pages. A judge shall make a de novo determination of those portions to which objection is made. This Report and Recommendation does not constitute an order or judgment of the District Court, and it is therefore not appealable directly to the Circuit Court of Appeals.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICES,
Respondent.

Civil File No. 01-1172 (JRT/AJB)

MEMORANDUM OPINION
AND ORDER ADOPTING THE
REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE

Jeffrey J. Keyes and Kevin M. Magnuson, BRIGGS AND MORGAN, 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN, 55402, for petitioner.

Lonnie F. Bryan, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415; Christine A. Bither and Greg D. Mack, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Civil Division, 1331 Pennsylvania Avenue, NW, Room 700S, Washington D.C., 20530, for respondent.

Petitioner Keyse Jama filed a petition for a writ of habeas corpus, seeking an order that would bar the United States Immigration and Naturalization Service ("INS") from removing him to Somalia. He claims that the INS cannot legally deport him to Somalia because Somalia has not agreed to accept him. The INS responded by filing a motion to dismiss on the basis that 8 U.S.C. § 1252(g) deprives the Court of jurisdiction over petitioner's claim. Even assuming the Court has jurisdiction, according to the INS, petitioner

can be legally removed to Somalia even though there has been no indication that he will be accepted there.

On February 1, 2002, United States Magistrate Judge Arthur J. Boylan concluded that § 1252(g) does not deprive a federal court of habeas jurisdiction under 28 U.S.C. § 2241. Reaching the merits of petitioner's claim, the Magistrate Judge concluded that petitioner cannot be removed to a country unless the governmental authority in that country agrees to accept him. Accordingly, he recommended to the Court that petitioner's application for a writ of habeas corpus be granted and that the INS be ordered not to remove petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him. This matter is now before the Court on the objections of the INS to the report and recommendation.

The Court has conducted a *de novo* review of petitioner's objections pursuant to 28 U.S.C. § 636(b)(l)(C) and D. Minn. L.R. 72.1(c)(2). For the reasons set forth below, the Court overrules the government's objections, adopts the report and recommendation of the Magistrate Judge, and orders the INS not to remove petitioner from the United States.

BACKGROUND

The facts of the case are undisputed. Petitioner was born in Somalia in 1979. In 1991, he and his family went to Kenya to escape inter-tribal warfare in their homeland. After living in Kenya for several years, petitioner and his family applied for admission to the United States as refugees. Their application was granted and petitioner arrived in the United States in February 1996 and later came to Minnesota. Petitioner settled in the Twin Cities area, where he worked and attended school. He never became a United States citizen or permanent resident alien, but simply retained his refugee status.

In June 1999, petitioner fought with another man. The man suffered a substantial injury, and petitioner was charged with assault. In September 1999, petitioner pled guilty to third degree assault – a felony under Minnesota law – and was sentenced to one year and one day in prison. His prison sentence was stayed and he was placed on probation for three years. Because he violated the conditions of his probation, he served time in state prison.

The INS then initiated removal proceedings against petitioner as a result of his felony conviction and he was taken into INS custody after completion of his state prison term in June 2000.[1] Petitioner attempted to avoid removal by filing an application for asylum, claiming that he would be persecuted if he returned to Somalia. He also filed a separate application for relief under the United Nations Convention Against Torture and filed an application for permanent resident alien status. In August 2000, an immigration judge conducted a hearing to determine whether petitioner should be removed from the United States. The immigration judge held that petitioner was removable because he had been convicted of a "crime of moral turpitude." He also rejected petitioner's applications for asylum and permanent resident legal status. Petitioner did not request that he be sent to any particular country, therefore, the immigration judge directed the INS to remove him to his homeland – Somalia. The immigration judge's decision was affirmed on appeal to the Board of Immigration Appeals ("BIA"). On May 25, 2001, the INS formally notified petitioner that the removal order would be executed.

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[1] Petitioner has been held in INS custody at all times since then. The INS detained petitioner for several months at the Minnesota Correctional Facility in Rush City, Minnesota and he was being detained at the Sherburne County Jail in Elk River, Minnesota at the time he filed his habeas petition. It is not clear whether petitioner is still in custody in Sherburne County or whether he has been transferred to some other detention facility.

Petitioner filed the current petition for habeas relief on June 28, 2001. Petitioner is not challenging the validity of his removal order nor is he challenging his current INS detention *per se*. Instead, petitioner is challenging the manner in which the INS plans to execute the removal order. More specifically, petitioner claims that the INS should not be allowed to physically transport him to Somalia and drop him off there, unless and until some proper governmental authority in Somalia has agreed to accept him.

The INS concedes that Somalia has been without a functioning central government since 1991. However, the INS claims that 8 U.S.C. § 1231(b)(2)(E)(iv) does not require consent before sending petitioner back to Somalia, the country where he was born. The Magistrate Judge disagreed with that argument, concluding that both the statutory language and relevant caselaw require that acceptance from a proper governmental authority be obtained before petitioner can be removed.

DISCUSSION

The INS objects to the report and recommendation of the Magistrate Judge, claiming that the Court lacks jurisdiction under 8 U.S.C. § 1252(g), the report and recommendation misconstrues the relevant statute, 8 U.S.C. § 1231(b)(2), and the habeas petition presents a nonjusticiable political question. The Court addresses each argument in turn.

I. Jurisdiction

The INS first argues that the Magistrate Judge erred in finding that the Court has habeas jurisdiction to review petitioner's claim. According to the INS, both the plain language of § 1252(g)[2] and the Supreme Court's decision in

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[2] 8 U.S.C. § 1252(g) provides:
Exclusive Jurisdiction.
Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear

Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999) ("*AADC*") clearly foreclose any judicial review of the Attorney General's decision to execute petitioner's removal order. The INS also contends that petitioner's claim fails to present habeas issues because petitioner is not challenging the legality of his detention or seeking release from custody. Rather, the Magistrate Judge recommends that injunctive relief be entered against the Attorney General which, the INS contends, is not the function of a habeas petition. For the reasons that follow, the Court rejects both of the INS's arguments.

First, the Magistrate Judge properly relied on *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), to conclude that § 1252(g) does not bar petitioner from seeking habeas corpus relief under § 2241. In *St. Cyr*, the Supreme Court held that the Antiterrorism and Effective Death Penalty Act ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") did not eliminate federal habeas review under § 2241. *Id.* at 2287. Although *St. Cyr* did not directly address § 1252(g), *id.* at 2285 n.34, the Court agrees with the Magistrate Judge that the same principles applied by the Court in *St. Cyr* apply with equal force here. As with the three IIRIRA sections reviewed in *St. Cyr*, § 1252(g) does not expressly mention habeas or § 2241 and it should not be understood to eliminate such review by implication. Moreover, serious constitutional problems would arise if § 1252(g) were interpreted to foreclose habeas review. *Id.* at 2282 ("a serious Suspension Clause issue would be presented if we were to accept the INS's submission that the 1996 statutes have withdrawn that power

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any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

[to issue the writ of habeas corpus] from federal judges and provided no adequate substitute for its exercise").

The Supreme Court's decision in *AADC* does not dictate a different result. In *AADC*, the Supreme Court held that § 1252(g) deprives federal courts of jurisdiction over actions challenging three discrete actions or decisions of the Attorney General, including decisions relating to the execution of removal orders. 525 U.S. at 492. But as petitioner argued below and as the Magistrate Judge and this Court agree, *AADC* is not a habeas case. Consequently, *St. Cyr*, not *AADC*, governs the resolution of this issue and compels the conclusion that the Court may properly entertain petitioner's habeas claim. *Carranza v. INS*, No. 00-2365, 2002 WL 47139, at *6 (1st Cir. Jan. 17, 2002) ("In light of *St. Cyr*, INS's principal argument – that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation – is a dead letter."); *Gerbier v. Holmes*, 280 F.3d 297, 302 (3d Cir. 2002) (district court has habeas jurisdiction in light of *St. Cyr*).

The Court also finds that the remedy under the federal habeas laws is broad enough and flexible enough to provide the relief sought in this case. In *St. Cyr*, for instance, the habeas petitioner was not seeking release from custody *per se* but rather was seeking an order compelling the INS to consider whether he should be granted a discretionary waiver of removal. 121 S. Ct. at 2278. In granting the habeas petition, the Supreme Court did not release the petitioner from custody. Rather, it merely directed the INS to consider whether petitioner should be granted a waiver. Likewise, in *Martin v. Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), the Eighth Circuit granted habeas relief in the form of an order directing the Federal Bureau of Prisons to consider whether petitioner should be allowed early release under 18 U.S.C. § 3621(e)(2)(B). *Id.* at 1081. *See also Goncalves v. Reno*, 144 F.3d 110, 122 (1st Cir. 1998) (granting writ of habeas corpus

ordering availability of discretionary relief in deportation proceedings); *Henderson v. INS*, 157 F.3d 106, 117-22 (2d Cir. 1998).

Moreover, petitioner here raises a pure question of law – whether it is legal for the INS to leave petitioner in Somalia without first obtaining some type of acceptance from a Somali governmental authority. As the Supreme Court noted in *St. Cyr*, habeas proceedings are routinely used to answer such purely legal issues. 121 S. Ct. at 2283 ("In case after case, courts answered questions of law in habeas corpus proceedings brought by aliens challenging Executive interpretations of the immigration laws."); *Henderson*, 157 F.3d at 119 n.9 (habeas jurisdiction extends to review of the Attorney General's "interpretation of the immigration laws"). Indeed, as discussed above, "a construction of [§ 1252(g)] that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions." *St. Cyr*, 121 S. Ct. at 2279.

For the foregoing reasons, the Court adopts the Magistrate Judge's conclusion that "[§ 1252(g)] does not bar federal courts from entertaining habeas corpus petitions brought by criminal aliens who are attempting to challenge removal proceedings on legal or constitutional grounds." Report and Recommendation at 12. Accordingly, the government's motion to dismiss for lack of jurisdiction is denied.

II. Merits of Petitioner's Claim

The INS next argues that the report and recommendation's conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) requires some unspecified consent from Somalia prior to removal that Somalia is willing to accept petitioner is erroneous and contradicts the plain language of the statute. According to the INS, subclauses (i) through (vi) of § 1231(b)(2)(E) do not require that the receiving country be willing to accept the alien.

Section 1231(b)(2) establishes a three-step process for determining where a removable alien should be sent after a final removal order has been entered against him. In the first step, the alien may designate a country to which he wants to be sent. 8 U.S.C. § 1231(b)(2)(A). This request will be granted unless, for instance, the government of the country designated by the alien is not willing to accept him into the country. *Id.* § 1231(b)(2)(B) and (C). If the process cannot be completed at step one, the INS at step two is directed to send the alien to the country of which he is a citizen – provided that the country is willing to accept him. The statute reads as follows:

> If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country–
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.

8 U.S.C. § 1231(b)(2)(D). Step three then designates additional removal countries should the INS be unsuccessful in removing the alien at steps one and two. That section provides, in its entirety:

> If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) the country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) the Country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E). The parties agree that petitioner's removal must be determined at step three of the selection process since petitioner did not designate a country in a timely fashion and because the "government of the country" of which petitioner is a "citizen," has not informed the INS that it will accept petitioner into the country. In this case, the reason the INS has not received acceptance is because Somalia presently lacks a functioning central government. The Magistrate Judge thus properly turned his attention to § 1231(b)(2)(E).

Upon review of the statutory provisions discussed above, the Magistrate Judge concluded that the acceptance requirement included in step two of the country selection process would be rendered meaningless if the INS in step

three could send an alien to the country in which he was born without obtaining that country's consent. The Magistrate Judge noted that a removable alien will almost invariably be a "subject, national or citizen" of the country in which he was born. As a result, the acceptance requirement of § 1231(b)(2)(D) is easily circumvented by § 1231(b)(2)(E)(iv) if the latter clause is read not to require acceptance. Therefore, in order to render meaningful force to all the portions of the statute, the Magistrate Judge concluded that the acceptance requirement listed in the seventh clause of step three, § 1231(b)(2)(E)(vii), was meant to apply to all the clauses listed in § 1231(b)(2)(E), including § 1231(b)(2)(E)(iv).

The Court concurs with the reasoning and conclusion of the Magistrate Judge. It is well established that when interpreting a statute, a court must seek to adopt a construction that gives effect to all its provisions. *Foulk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001) (rejecting interpretation that would render portion of the statute meaningless); *United States v. Herron*, 97 F.3d 234, 237 (8th Cir. 1996) (rejecting interpretation of statute that would render element of the statute repetitive and meaningless); *McNely v. Ocala Star Banner Corp.*, 99 F.3d 1068, 1075 (11th Cir. 1996) (courts should avoid interpretations in which a literal interpretation of a statute produces absurd results). In addition, relevant case law interpreting 8 U.S.C. § 1253(a), the statutory predecessor of § 1231(b)(2), supports the Magistrate Judge's statutory construction. *United States ex rel. Tom Man v. Murff*, 246 F.2d 926 (2d Cir. 1959); *Lu v. Rogers*, 164 F. Supp. 320, 321 (D.D.C. 1958); *United States ex rel. Wong Kan Wong v. Esperdy*, 197 F. Supp. 914, 917 (S.D.N.Y. 1961); *Hom Sin v. Esperdy*, 209 F. Supp. 3, 4 (S.D.N.Y. 1962). In *Tom Man*, the leading case on this issue, the court interpreted the third step of § 1253(a) the same way as the Magistrate Judge interpreted § 1231(b)(2)(E) here:

> There remains therefore one or more of the seven subdivisions of 243(a) of which number three certainly covers him and probably several others. **However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into his territory."**

Id. at 928 (emphasis added).

In an attempt to divorce itself from the force of *Tom Man* and the Magistrate Judge's reasonable interpretation of § 1231(b)(2)(E), the INS argues that the Magistrate Judge's reliance on *Tom Man* and other cases interpreting § 1253(a) is misplaced because it ignores the "revision and reorganization" of the new statute. The Court has carefully reviewed both statutes but finds no meaningful distinction between the two statutes. Aside from the introduction of subheadings into the statute's text, the language in the old statute, as the government itself concedes, contains the same or similar language that is found in § 1231(b)(2). Accordingly, the holdings in *Tom Man* and similar cases are on all fours with the interpretation of the statute in this case.

In interpreting the statute as he did, the Magistrate Judge also pointed out that in fifty pages of briefing, the government "has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him." Report and Recommendation at 18 (emphasis in original). Now for the first time, the INS points to a Board of Immigration Appeals decision interpreting § 1253(a) in support of its argument that acceptance from the receiving country is not required to remove an alien pursuant to § 1231(b)(2)(E)(iv). *Matter of Niesel*, A-12281979, 1962 WL 12904 (BIA Aug. 10, 1962) (concluding that "[w]hen designating a country in step three as a place of deportation, there is no requirement that preliminary inquiry be addressed to the country to which

deportation is ordered (other than perhaps the seventh country in the list – a country which is willing to accept the alien into its territory)"). The INS argues that the Court should extend deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), to the BIA's interpretation of § 1253(a).

In *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999), the Supreme Court held that the principles of *Chevron* generally apply to the statutory scheme set out in the INA. *Id.* at 424. However, under *Chevron*, a court only defers "to agency interpretations of statutes, that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 121 S. Ct. at 2290, n.45 (quoting *Chevron*, 467 U.S. at 543). In this case, the Court finds that Congress expressed its intent clearly in § 1231(b)(2) that acceptance is required by the receiving country and that this requirement applies to all three steps of the removal process, including all the clauses listed in § 1231(b)(2)(E). Accordingly, having found no ambiguity in the statute, under *Chevron*, the Court need not defer to the BIA's 1962 interpretation. *Valansi v. Ashcroft*, 278 F.3d 203, 208-14 (3d Cir. 2002) (court did not defer to the BIA's interpretation of 18 U.S.C. § 656 because statutory language has a clear meaning). The government's objections to the Magistrate Judge's interpretation of § 1231(b)(2)(E) are thus overruled.

III. Political Question

In the final part of its objections, the INS argues for the first time that the Attorney General's decision to execute petitioner's removal order presents a nonjusticiable political question committed to the executive branch of government. Specifically, the INS claims that the determination of what constitutes "acceptance" under § 1231(b)(2) is a determination clearly committed to and best answered by the political branches of government and therefore is beyond the institutional competency of the judiciary.

Clearly, an affirmative agreement between two governments that have some level of diplomatic relations would constitute acceptance under the statute. Ideally, this would be the situation in all cases. The more difficult question arises where either there are no diplomatic relations or there exists no functioning central government in the receiving country. Whether the Attorney General can find acceptance in those circumstances is a difficult question but one that the Court need not address in this case because the INS has conceded there is no acceptance. Throughout fifty pages of briefing to the Magistrate Judge, the INS admitted that there was no "acceptance" of the petitioner from a functioning government in Somalia. Rather, it argued that acceptance was not required by the congressional statute authorizing removal, § 1231(b)(2)(E). Because of this concession, the Court will not now entertain the INS's claim that the Court's ability to define what is or is not "acceptance" under § 1231(b)(2) is a question best answered by the executive branch of government.

While a formal written "acceptance" executed by two countries who have diplomatic relations is surely the preferred form of acceptance, other forms of acceptance based on custom and practice showing mutual agreement between two countries may also be sufficient under the statute. It is difficult for the Court to see how the INS's apparent current practice of dropping off an alien in a territory with no functioning government complies with the statute. In essence, "acceptance" occurs under this policy when no one returns the deported alien. The silence of a non-functioning government in a lawless territory – with grave risks to the deported alien – simply cannot constitute "acceptance" under § 1231(b)(2).

The Court overrules the INS's objections and adopts the report and recommendation of the Magistrate Judge.

ORDER

Based on the foregoing, the submissions of the parties, and all of the files, records, and proceedings herein, the Court **OVERRULES** respondent's objections [Docket No. 22] and **ADOPTS** the Report and Recommendation of the Magistrate Judge [Docket No. 18]. Accordingly, **IT IS HEREBY ORDERED** that:

1. Respondent's Motion to Dismiss [Docket No. 6] is **DENIED**.

2. Petitioner's application for a writ of habeas corpus [Docket No. 1] is **GRANTED**.

3. Respondent is ordered not to remove Petitioner from the United States until the government of the country to which he is to be removed has agreed to accept him and upon further order of this Court.

DATED: March 31, 2002

at Minneapolis, Minnesota.

/s/

JOHN R. TUNHEIM

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2324

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Melloy would grant the petition for rehearing en banc.

Judge McMillian and Judge Murphy did not participate in the consideration or decision of this matter.

(5128-010199)

August 6, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2324

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

Appellee Jama's motion to recall the mandate and to stay the mandate pending filing of a petition for writ of certiorari in the Supreme Court has been considered by the court and is denied.

August 28, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-674

In the Supreme Court of the United States

KEYSE G. JAMA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
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QUESTION$ PRESENTED

Whether immigration officials may remove petitioner to his country of birth under 8 U.S.C. 1231(b)(2)(E)(iv), where that country lacks a functioning central government that is able either to accept petitioner's return or to withhold acceptance.

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In the Supreme Court of the United States

No. 03-674

KEYSE G. JAMA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 329 F.3d 630. The memorandum opinion and order of the district court (Pet. App. 42a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. A petition for rehearing was denied on August 6, 2003 (Pet. App. 56a). The petition for a writ of certiorari was filed on November 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1231(b), specifies the countries to which aliens

who are subject to a final administrative order of removal may or must be removed under particular circumstances. Within that provision, Section 1231(b)(2) governs the removal of aliens who, rather than being stopped at the border and denied entry, achieved initial entry into the United States. Section 1231(b)(2)(A) and (B) of Title 8 allows such aliens to designate the country to which they want to be removed. Section 1231(b)(2)(C) provides that the Attorney General "may disregard" those designations if the government of the designated country does not timely inform the Attorney General of its acceptance of the alien, that government is not willing to accept the alien, or the Attorney General decides that removal to the designated country would be prejudicial the United States. 8 U.S.C. 1231(b)(2)(C).[1]

Section 1231(b)(2)(D) provides that an alien who is not removed to a country he designates "shall" be removed "to a country of which the alien is a subject, national, or citizen," unless the government of such country either fails to timely inform the Attorney General of its acceptance of the alien or is not willing to accept the alien. 8 U.S.C. 1231(b)(2)(D).

[1] On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service, were transferred to the Department of Homeland Security. See Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2), 451(b), 116 Stat. 2192, 2196 (to be codified at 6 U.S.C. 251(2), 271(b)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

Section 1231(b)(2)(E) sets out other countries to which "the Attorney General shall remove" an alien who is not removed to a country under Section 1231(b)(2)(A)-(D). 8 U.S.C. 1231(b)(2)(E). Clauses (i) through (vi) provide the following options, from which the Attorney General may select: (i) the country from which the alien was admitted to the United States; (ii) the country from which the alien left for the United States; (iii) a country in which the alien formerly resided; (iv) the country in which the alien was born; (v) the country that had sovereignty over the alien's birthplace when the alien was born; and (vi) the country in which the alien's birthplace is located. 8 U.S.C. 1231(b)(2)(E)(i)-(vi). Clause (vii) then provides that if it is "impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause," then the Attorney General must remove the alien to "another country whose government will accept the alien into that country." 8 U.S.C. 1231(b)(2)(E)(vii).[2]

2. Petitioner is a native and citizen of Somalia who was admitted to the United States in 1996 as a refugee. Pet. App. 43a. Since 1991, Somalia has lacked a functioning central government. *Id.* at 24a.

In 1999, petitioner was convicted of felony assault in Minnesota. Pet. App. 44a. Petitioner received a suspended sentence of one year and one day and was placed on probation for three years. *Ibid.* Petitioner later violated the conditions of his probation and was required to serve his sentence of imprisonment. *Ibid.*

While petitioner was serving his sentence, the Immigration and Naturalization Service (INS) commenced

[2] Section 1231(b)(2)(F) gives the Attorney General additional flexibility in executing removal orders during wartime. 8 U.S.C. 1231(b)(2)(F).

removal proceedings against him by charging that the assault conviction was a "crime of moral turpitude" under 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 44a. In his removal proceeding before an immigration judge, petitioner conceded that he is a removable alien under the INA, but applied for asylum and other forms of protection from removal, arguing that he would be persecuted if returned to Somalia. See *id.* at 1a, 22a-23a. The immigration judge determined that petitioner is removable based on his assault conviction and denied petitioner's applications for protection from removal. *Id.* at 23a, 44a. Because petitioner declined to designate a country of removal and the immigration judge determined that petitioner is not eligible for relief from removal to Somalia, the immigration judge designated petitioner's home country of Somalia as the country of removal. *Id.* at 44a. The Board of Immigration Appeals (BIA) affirmed the order of removal. *Id.* at 1a-2a.[3]

3. In May 2001, the INS notified petitioner that it intended to execute his removal order. Pet. App. 2a, 44a. In June 2001, before his planned removal, petitioner filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the District of Minnesota. Petitioner argued that the INS lacks authority to remove him to Somalia in the absence of a functioning Somali central government that is able to accept his return. Pet. App. 3a, 45a. Petitioner did not renew his contention that he would suffer persecution if

[3] The Attorney General and the Secretary of Homeland Security have designated Somalia as a country whose nationals in the United States may apply for Temporary Protected Status to avoid removal during the period of the designation. See 8 U.S.C. 1254a; 68 Fed. Reg. 43,147 (2003). Temporary Protected Status is not available to alien felons like petitioner, however. See 8 U.S.C. 1254a(c)(2)(B)(i).

returned to Somalia, nor did he purport to seek review of his order of removal. See *id.* at 13a-20a (reproducing habeas corpus petition).

Adopting the report and recommendation of a magistrate judge, see Pet. App. 21a-41a, the district court granted the habeas corpus petition and ordered the INS not to remove petitioner from the United States "until the government of the country to which he is to be removed has agreed to accept him and upon further order of this Court," *id.* at 55a. The district court first rejected the government's argument that its review of the habeas corpus petition was barred by 8 U.S.C. 1252(g), which denies courts "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders." 8 U.S.C. 1252(g). Citing *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the court reasoned that "§ 1252(g) does not expressly mention habeas or § 2241 and it should not be understood to eliminate such review by implication." Pet. App. 46a. The court thus concluded that it had jurisdiction to consider whether immigration officials may remove petitioner to Somalia "without first obtaining some type of acceptance from a Somali governmental authority." *Id.* at 48a.

On that question, the district court agreed with the parties and the magistrate judge that, because petitioner did not designate a country of removal and Somalia has not accepted his return, petitioner's removal is governed by Section 1231(b)(2)(E), and specifically clause (iv) of that section, which authorizes removal to the alien's country of birth. Pet. App. 50a-51a. The court concluded that the requirement of acceptance by the country of removal that appears in 8 U.S.C. 1231(b)(2)(E)(vii) "was meant to apply to all

the clauses" of Section 1231(b)(2)(E), including clause (iv). Pet. App. 51a.

The district court determined (Pet. App. 51a-52a) that its reading of Section 1231(b)(2)(E) is consistent with case law discussing 8 U.S.C. 1253(a) (1994), which is the statutory predecessor of Section 1231(b)(2). The court gave no weight to the BIA's contrary construction of former Section 1253(a) in *In re Niesel*, 10 I. & N. Dec. 57, 58-59 (1962), stating that deference to administrative interpretations is unwarranted in this case because there is "no ambiguity" in the language of Section 1231(b)(2)(E). Pet. App. 53a.

4. a. The United States Court of Appeals for the Eighth Circuit reversed and remanded to the district court for the entry of an order denying the habeas corpus petition. Pet. App. 1a-12a. The court of appeals agreed with the district court that 8 U.S.C. 1252(g) does not bar judicial consideration of petitioner's habeas corpus petition (Pet. App. 3a-4a), but it concluded on the merits that the plain language of 8 U.S.C. 1231(b)(2)(E)(iv)—which permits removal to an alien's country of birth and does not contain an acceptance requirement—establishes that acceptance is not required for removal under that clause. Pet. App. 6a. The court explained that "as [a] matter of simple statutory syntax and geometry, the acceptance requirement [in Section 1231(b)(2)(E)] is confined to clause (vii), and does not apply to clauses (i) through (vi)." *Ibid.*

The court rejected petitioner's contention that its interpretation of Section 1231(b)(2)(E) "nullifies" the provision for acceptance as a condition of removal to the country of which the alien is a subject, national, or citizen, pursuant to Section 1231(b)(2)(D). Pet. App. 7a. The court explained that an alien born in the country to which he is to be removed under Section

1231(b)(2)(E)(iv) "is not always a subject, national or citizen" of that country, so Section 1231(b)(2)(D) may not apply to the alien at all. *Ibid.* The court also observed that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first"—*i.e.*, to attempt consensual removal under Section 1231(b)(2)(D)—"and then to act anyway if the request is refused." *Ibid.* The court concluded that its interpretation of Section 1231(b)(2) does not conflict with any "settled judicial construction" of former Section 1253(a), *ibid.*, and that a BIA decision cited by petitioner, *In re Linnas*, 19 I. & N. Dec. 302 (1985), did not overrule the earlier *Niesel* decision that rejected an acceptance requirement, see Pet. App. 7a-8a.

Judge Bye dissented. In his view, the district court's inference of an acceptance requirement under Section 1231(b)(2)(E)(iv) was consistent with a "well-settled construction given [8 U.S.C. 1253(a) (1994)] by the courts and the INS." Pet. App. 10a. Judge Bye further stated that allowing the removal of aliens to countries that lack a functioning central government is an "absurd result[]," *id.* at 11a, that violates his "sense of liberty and justice," *id.* at 12a.

b. On August 6, 2003, the court of appeals denied petitioner's request for rehearing and rehearing en banc. Pet. App. 56a. On August 13, 2003, the court of appeals issued its mandate. In an effort to prevent his removal to Somalia under his removal order and the court of appeals' decision, petitioner then asked the court of appeals to recall its mandate pending his filing of a petition for a writ of certiorari. On August 28, 2003, the court of appeals denied that motion. *Id.* at 57a. On November 4, 2003, petitioner filed the instant petition for a writ of certiorari. On November 10, 2003, the court of appeals granted petitioner's renewed mo-

tion to recall the mandate and stayed the issuance of its mandate until this Court "takes action on [petitioner's] petition for certiorari." App., *infra*, 1a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. Although a panel of the Ninth Circuit has disagreed with the Eighth Circuit's interpretation of 8 U.S.C. 1231(b)(2)(E), that conflicting decision is the subject of a pending petition for rehearing en banc in the Ninth Circuit. Moreover, if the Ninth Circuit denies rehearing en banc, that case may provide a better vehicle for this Court's review of the statutory removal issue, as well as additional issues in that case.

1. a. The court of appeals correctly concluded that the absence of a functioning central government in Somalia does not preclude petitioner's removal to Somalia under 8 U.S.C. 1231(b)(2)(E)(iv). Congress referred to "accept[ance]" as a condition on removal under *other* provisions of Section 1231(b)(2). See 8 U.S.C. 1231(b)(2)(D) and (E)(vii). But no such requirement appears in clauses (i) through (vi) of Section 1231(b)(2)(E). That omission is critical, for "[w]here Congress includes particular language in one section of [the Immigration and Naturalization Act] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421. 432 (1987) (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). As the Eighth Circuit put it, "[c]ourts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit."

Pet. App. 6a (quoting *Root* v. *New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000)).

There is an acceptance requirement in Section 1231(b)(2)(E)(vii). But it does not apply here, because the Secretary of Homeland Security (through his designees) has determined that it is not "impracticable, inadvisable, or impossible," 8 U.S.C. 1231(b)(2)(E)(vii), to remove petitioner to Somalia (the country of his birth) pursuant to Section 1231(b)(2)(E)(iv). Indeed, the Office of the Solicitor General has been informed by the Department of Homeland Security that, since Fiscal Year 1997, the United States has removed approximately 200 aliens to Somalia.[4]

b. Petitioner argues (Pet. 11) that, in enacting current Section 1231(b)(2) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 305(a)(3), 110 Stat. 3009-600, Congress ratified "a clear line" of judicial and administrative precedent that interpreted 8 U.S.C. 1253(a) (1994) as requiring acceptance of the alien by the country of removal in all cases. Petitioner is mistaken.

The court of appeals correctly concluded that "there exist[ed] no settled judicial construction" of former Section 1253(a) that required acceptance of the alien by the foreign government in all circumstances. Pet. App. 7a. Of particular significance here, none of the decisions

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[4] If petitioner's reading of Section 1231(b)(2)(E)(iv) were correct, then this case would present the further issue whether provisions for acceptance between governments are enforceable by an individual alien against the United States Government in light of 8 U.S.C. 1231(h), which provides: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

cited by petitioner involved a country of removal that lacked a functioning central government. Only one of the court cases cited by petitioner (Pet. 9-10), *United States ex rel. Tom Man* v. *Murff*, 264 F.2d 926 (2d Cir. 1959), involved a situation in which an alien sought to prevent his removal to a country that had not indicated acceptance or rejection of the removal. The other passages on which petitioner relies are dicta, or otherwise unhelpful to petitioner. See *Amanullah* v. *Cobb*, 862 F.2d 362, 365-366 (1st Cir. 1988) (citing *Tom Man* in interpreting different provision of INA); *Lee Wei Fang* v. *Kennedy*, 317 F.2d 180 (D.C. Cir.) (upholding removal of mainland Chinese to Taiwan and Hong Kong, rather than Communist China), cert. denied, 375 U.S. 833 (1963); *Chi Sheng Liu* v. *Holton*, 297 F.2d 740, 743 (9th Cir. 1961) (noting *Tom Man* decision, but determining that country of removal had accepted alien); *Rogers* v. *Lu*, 262 F.2d 471 (D.C. Cir. 1958) (per curiam) (summarily affirming order barring deportation).

Petitioner's argument also is not supported by the administrative decisions he cites (Pet. 11). In *In re Linnas*, 19 I. & N. Dec. 302 (1985), the Board of Immigration Appeals accepted the Second Circuit law established in *Tom Man* for the purpose of deciding a case that arose in that circuit, without independently reaching the same conclusion as *Tom Man* or overruling its earlier rejection of an acceptance requirement in *In re Niesel*, 10 I. & N. Dec. 57, 59 (1962). See *Linnas*, 19 I. & N. Dec. at 306-307. In *In re Anunciacion*, 12 I. & N. Dec. 815 (1968), the BIA did not mention (much less purport to overrule) *Niesel*, and appears only to have acknowledged the practical difficulty that the United States would face in deporting an alien to the Philippines if the government of that country refused to accept her. *Id.* at 818.

In short, decisions arising under now-repealed provisions of the INA furnish no basis for certiorari in this case arising under 8 U.S.C. 1231(b)(2).[5]

c. Petitioner asserts (Pet. 13-15) that the Eighth Circuit's interpretation of 8 U.S.C. 1231(b)(2)(E) is incorrect, because it may allow the government to remove an alien under clauses (i) through (vi) when the alien could not be removed to the same country under 8 U.S.C. 1231(b)(2)(D) in light of the provision for acceptance as a condition on removal under the authority of that section. As the court of appeals explained (Pet. App. 7a), however, there is nothing "anomalous" (Pet. 15) about a statutory framework under which immigration officials first seek acceptance from the country of removal pursuant to Section 1231(b)(2)(D) if that section applies, but nevertheless have authority under Section 1231(b)(2)(E) to effectuate the removal of the alien to that country if it is "[]practicable, []advisable, [and] []possible," 8 U.S.C. 1231(b)(2)(E)(vii), even though acceptance has not been forthcoming. By contrast, it *would* be truly "anomalous" if Section

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[5] In February 2003, the Office of Legal Counsel (OLC) of the Department of Justice rendered an opinion addressing the timing of removal actions under 8 U.S.C. 1231(a), in which OLC indicated that removal under Section 1231(b)(2)(E)(i)-(vi) ordinarily entails acceptance by the existing government of the country of removal. See Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service 27 n.11 (OLC Feb. 20, 2003), available at <http://www.usdoj.gov/olc/INSDetention.htm>. Section 1231(b)(2) was not the subject of OLC's advice. Furthermore, the opinion on its face does not consider the situation in this case, where the country of removal lacks a functioning government and acceptance therefore would be a practical impossibility. We are advised that the alien who was the subject of OLC's opinion had no connection to Somalia.

1231(b)(2) imposed an inflexible acceptance requirement as petitioners suggests. Under that rule, the United States could be barred from expelling an alien from its own territory merely because the alien's own country happened to be without a functioning central government, and foreign governments could prevent the United States from repatriating their nationals merely by failing to indicate acceptance of the repatriation, even when the United States has determined that the removal is possible and advisable.

The permissive language of Section 1231(b)(2)(C)—which provides that the Attorney General "may" (not "must") disregard the alien's designation in the absence of acceptance—allows the Attorney General, in his discretion, to remove an alien to a country the alien has designated, even if that country is not willing to accept the alien. See 8 U.S.C. 1231(b)(2)(C). Thus, Section 1231(b)(2) plainly does not establish an absolute statutory requirement of respecting foreign governments' wishes concerning removal. Furthermore, although Section 1231(b)(2)(D) provides that the Attorney General "shall" remove the alien to his country of citizenship or nationality "unless" the government of that country does not respond in a timely manner or is not willing to accept the alien, it does not further provide that the Attorney General shall not remove the alien to that country if its government does not give its consent. Thus, removal to that country remains permissible where, as here, that country falls within clauses (i) through (vi) of Section 1231(b)(2)(E), which contain no condition of acceptance.

Nevertheless, as Judge Bye noted in dissent (Pet. App. 11a), the United States typically will not attempt to remove an alien to a country whose government is unwilling to receive the alien. The legal question

framed in the instant petition therefore is not likely to determine whether an alien will be removed, *except* in those instances in which the country of removal lacks a functioning government that could give its consent. It is particularly unlikely that Congress intended to disable immigration officials from executing a final order of removal in that unusual situation, because proceeding with the removal would not implicate the sovereign authority of any other government.

Finally, there is no force to petitioner's invocation (Pet. 17-18) of supposed "human rights abuses" if he is removed to Somalia. Petitioner claimed in the immigration court that he would be subject to persecution if returned to Somalia, but the immigration judge, affirmed by the BIA, determined that petitioner does not qualify for protection from removal under the asylum provisions of the INA or other provisions of the immigration laws. See p. 4, *supra*. Petitioner did not seek direct judicial review of the BIA's decision or challenge it in his habeas corpus petition. And petitioner does not make any showing that the rejection of his applications for protection from removal was incorrect.

2. As petitioner observes (Pet. 9), in the one other court of appeals decision arising under the current provision of the INA, the Ninth Circuit recently concluded that acceptance by the country of removal is "implicitly required for all removals" under 8 U.S.C. 1231(b)(2)(E). *Ali* v. *Ashcroft*, 346 F.3d 873, 881 (9th Cir. 2003), petition for reh'g pending, No. 03-35096 (9th Cir.). On December 12, 2003, however, the government filed a petition for rehearing en banc in *Ali*, in which it sought further review of that issue. If the Ninth Circuit grants the government's petition and vacates the panel's decision, then the circuit conflict on which petitioner relies will cease to exist.

Even if the Ninth Circuit denies the government's rehearing petition in *Ali*, the instant case may not be the best vehicle for addressing the circuit conflict. Whereas this case involves the removal of a single alien, *Ali* affirmed a permanent injunction against the removal of a nationwide class consisting of:

> All persons in the United States who are subject to orders of removal, expedited removal, deportation or exclusion to Somalia that are either final or that [the government] believe[s] to be final, excluding any person with a habeas petition pending, or an appeal, raising the issue of unlawful removal to Somalia under 8 U.S.C. § 1231(b).

Ali v. *Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash. 2003); see 346 F.3d at 876, 886-891. The Ninth Circuit's approval of nationwide class relief prevents the removal of thousands of Somalis who are under a final order of removal or otherwise lack permission to be in the United States, and raises important issues in addition to the issue under Section 1231(b)(2) that is presented in the instant petition.[6]

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[6] By its terms, the injunction in *Ali* does not extend to removable aliens who filed habeas corpus petitions before its imposition. Those non-class members include petitioner, the aliens in another Eighth Circuit case involving removal to Somalia under 8 U.S.C. 1231(b)(2)(E), see *Omar* v. *INS*, No. 03-2653 (docketed June 26, 2003), and the seven habeas corpus petitioners in *Mohamed* v. *INS*, No. 02-2484 (W.D. La. June 27, 2003), appeal pending, No. 03-30675 (5th Cir. briefing completed Dec. 4, 2003). In *Mohamed*, the district court concluded, consistent with the Eighth Circuit's determination in this case, that under "the plain language of § 1231(b)(2)(E)" acceptance by Somalia is not a necessary precondition to removal. 6/27/03 Ruling at 15, *Mohamed* v. *INS*, *supra* (No. 02-2484).

The legal issues surrounding the class certification in *Ali* include whether the Attorney General and the Secretary of Homeland Security are proper respondents in habeas corpus actions concerning enforcement of the immigration laws—a question that the Ninth Circuit has decided in conflict with several other courts of appeals and that must be answered in the affirmative for a nationwide habeas corpus class action even to be potentially viable in the immigration area. Compare *Ali*, 346 F.3d at 887-888 (Attorney General is proper habeas respondent), and *Armentero* v. *INS*, 340 F.3d 1058, 1061 (9th Cir. 2003) (Attorney General and Secretary of Homeland Security are proper habeas respondents in "circumstances specific to the situation of immigration detainees"), petition for reh'g en banc pending, No. 02-55368 (9th Cir.), with *Roman* v. *Ashcroft*, 340 F.3d 314, 318-327 (6th Cir. 2003) (Attorney General not alien's immediate custodian and therefore not proper habeas respondent), petition for reh'g en banc pending, No. 02-3253 (6th Cir.); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000) (same), cert. denied, 534 U.S. 816 (2001); and *Yi* v. *Maugans*, 24 F.3d 500, 507 (3d Cir. 1994) (stating, in refusing to certify nationwide habeas class of Chinese aliens, that immediate-custodian rule applies in immigration context). Accordingly, even if the government's pending petition for rehearing in *Ali* were denied, the removal issue in this case might be better considered (if at all) in *Ali*, which squarely presents that issue as well as additional issues of general importance on which the courts of appeals are divided.[7]

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[7] Although the government's position is that the INS was not a proper respondent to the habeas corpus petition in this case, the habeas petition nevertheless was filed in the judicial district where petitioner is held in immigration custody and where the former

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2004

INS District Director (see note 1, *supra*) was located, and the issue was not litigated below. In *Ali*, as in this case, the court of appeals rejected the government's argument that it lacked jurisdiction under 8 U.S.C. 1252(g). See 346 F.3d at 878-880.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 2-2324MNST

KEYSE G. JAMA, APPELLEE

v.

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

Nov. 10, 2003

Appeal From The United States District Court of The District of Minnesota

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The motion to recall the mandate is granted and the mandate is stayed until the Supreme Court of the United States takes action on Mr. Jama's petition for certiorari. (5362-010199)

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(3)

Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

No. 03-674

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S REPLY MEMORANDUM

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INTRODUCTION

"For nearly a half-century, the courts have held the United States cannot deport an alien unless the receiving country advises us it is willing to accept the alien." Pet. App. 9a (Bye, J., dissenting) (collecting cases). The Eighth Circuit's decision stands alone in holding that 8 U.S.C. § 1231(b) authorizes the government to deport a person from the United States without first establishing that the country in question would accept his or her return. Respondent has failed to identify any valid reason why the Supreme Court should not review this issue of national importance.

I. THE EIGHTH CIRCUIT SPLIT FROM THE SETTLED AUTHORITY ON AN ISSUE OF NATIONAL IMPORTANCE.

In its brief opposing certiorari, the government is unable to refute the fact that the Eighth Circuit's opinion creates a split of authority in an area of national importance and fundamental human rights. Indeed, the Eighth Circuit itself explicitly acknowledged its creation of this split: "[Petitioner] cites *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959), and its unquestioning progeny for the proposition that the acceptance requirement of clause (vii) applies to clauses (i) through (vi). We are not bound by these decisions; indeed, we are not persuaded by them . . .."[1] Pet. App. 6a. The Ninth Circuit, as well,

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[1] The Eighth Circuit did not distinguish *Tom Man* as having interpreted a different, earlier statute. Rather, the Eighth Circuit simply disagreed with, and split from, the Second Circuit's ruling in *Tom Man*. Pet. App. 6a. Indeed, there is no basis to distinguish between the two statutes. The District Court of Minnesota "carefully reviewed both statutes but [found] no meaningful distinction between the two statutes" and the government conceded that the statutes contain "the

recognized this fundamental split of authority in its *Ali v. Ashcroft* decision:

> Requiring acceptance before removal is consistent with all of the case law that has touched on the question. The one exception is the Eighth Circuit's decision in *Jama* . . .. We thus disagree not only with the conclusion of the majority opinion in *Jama* but also with its statement that there is "no settled judicial construction of the provision in question."

Ali v. Ashcroft, 346 F.3d 873, 882 (9th Cir. 2003). Furthermore, Respondent admits that a clear split exists between the Eighth and Ninth Circuits. Brief in Opp. at 9. The result of the opposing interpretations dividing the circuits will be sharply different treatment of identically situated persons based solely on the location in which they are detained.

Unable to refute this compelling basis for the granting of certiorari, the government instead "suggests" that this issue of national importance "might be better considered" in the context of the *Ali* case. Brief in Opp. at 17. However, the government's argument contains no compelling reason to deny certiorari in this case. To the contrary, the government's suggestion in fact *concedes* that the issue in question, whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal, is one meriting the Supreme Court's attention. *Id.* at 16. The fact that *Ali* is a class action suit is irrelevant. If the Supreme Court decides the issue of

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same or similar language." *Jama v. INS*, 2002 WL 507046, *6 (D. Minn. Mar. 31, 2002) (Tunheim, J.), Pet. App. at 52a.

statutory construction in this case, the ruling will have national application regardless of the fact that the present case is not a class action.[2]

The present petition should not be denied in favor of reviewing the identical statutory question in *Ali* for a more fundamental reason. If certiorari is denied in this case, the Petitioner is subject to immediate removal to Somalia. Assuming the Supreme Court ever reaches the question in the context of the *Ali* case, if the Supreme Court concludes that removal is improper absent acceptance from the receiving country, then Petitioner will have suffered irreparable, perhaps fatal, harm.[3] Justice should not be denied today in

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[2] That *Ali* also involves issues of class certification and identification of the proper respondent does not weigh in favor of denying certiorari here. The government is unable to refute that the issue of statutory construction alone is of sufficient significance to merit certiorari. Should additional issues present in *Ali* merit consideration, the Supreme Court may consolidate that case with the present matter.

[3] The government attempts to minimize the human rights concerns of the present matter, asserting that there is "no force" to Petitioner's statement that this matter is of national importance. Brief in Opp. at 14-15. It should be noted, however, that Somalia is included in the small group of countries for which Temporary Protected Status is available. *See* INA § 244(b), 8 U.S.C. § 1254a (2002); 8 C.F.R. § 244. That status extends to eligible aliens who cannot return to their countries of birth due to armed conflict, natural disaster, or other extraordinary circumstances. The government notes that Petitioner was not granted asylum under this statute. However, Petitioner's asylum application only addressed the issue of an *individualized* fear of persecution and not the general danger return to Somalia entails. Regardless of the reasons that Petitioner was not granted asylum, there is no

favor of the possibility of justice tomorrow, particularly where tomorrow will be too late for Petitioner.

II. A "PLAIN READING" OF THE STATUTE CANNOT SUPPORT THE EIGHTH CIRCUIT'S RULING.

The government also argues that review is unwarranted because the Eighth Circuit's decision is supported by a "plain reading" of the statute.[4] This argument fails. First, it is nonsensical to argue that the "plain meaning" conclusively supports an interpretation contrary to the reading courts unanimously have been applying for *fifty years*.

In 1959, Judge Learned Hand of the Second Circuit explicitly recognized that the removal statute required acceptance in all of the statute's subdivisions:

> There remains therefore one or more of the seven subdivisions of 243(a) of which number three [the country in which he was born] certainly covers him and probably several others. *However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into his territory."*

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question that removing persons such as Petitioner to Somalia "would subject them to human rights abuses in violation of customary international law and provisions of three multilateral treaties to which the United States is a signatory." *Ali*, 346 F.3d at 885 (quotation omitted).

[4] The Petitioner set forth his arguments on the proper reading of the statute in his Petition and will not repeat them here.

United States ex rel. Tom Man v. Murff, 264 F.2d 926, 928 (2d Cir. 1959) (emphasis added). Until the Eighth Circuit's decision, the federal courts uniformly recognized and followed this authority. *See, e.g., Chi Sheng Liu v. Holton*, 297 F.2d 740, 744 (9th Cir. 1961) (expressly adopting *Tom Man*'s interpretation in holding that statute requires INS to seek and obtain the consent of a foreign country prior to repatriation); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958) (pre-dating *Tom Man* and affirming judgment that Attorney General "may not deport the plaintiff . . . to the mainland of China until and unless the Chinese People's Republic has advised the defendant that it is willing to accept the plaintiff into the mainland of China").[5]

The government attempts to distinguish the present matter from the previous case law on the grounds that Somalia has no acting central government and thus the acceptance requirement cannot apply. The statute contains no such distinction. Judge Tunheim concluded that "[t]he silence of a non-functioning government in a lawless territory—with grave risks to the deported alien—simply cannot constitute "acceptance under § 1231(b)(2)." Pet. App. 54a.

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[5] Respondent attempts to distinguish Petitioner's case law on this point by suggesting that the cases other than *Tom Man* and *Ali* offer summary holdings or are dicta. Brief in Opp. at 11. To the contrary, these cases illustrate the settled nature of the interpretation in *Tom Man*. Furthermore, Respondent is completely unable to distinguish *Tom Man*, as it is directly on point and conclusively holds that acceptance is required from the "additional removal countries" set forth in step three of the removal statute. Therefore, even under the government's assertion, there remains a clear and definite split between the Eighth and the Second (as well as Ninth) Circuits.

Furthermore, on February 20, 2003 the Office of Legal Counsel of the Department of Justice rendered an Opinion which admits that acceptance is required pursuant to each subsection of the statute:

> If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* INA § 241(b)(2)(E)(i)-(vi). *Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time -- presumably 30 days -- to decide whether to accept or reject the alien.* Finally, ***if none of the six listed countries is willing to accept the alien***, or if the Attorney General decides that it would be "inadvisable" to send the alien to any of the listed countries that is willing to accept him, the Attorney General is instructed to remove the alien to any country of the Attorney General's choice whose government is willing to accept the alien. *See* INA § 241(b)(2)(E)(vii).

See Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service, n.11 (OLC Feb. 20, 2003) (emphasis added), available at http://www.usdoj.gov/olc/INSDetention.htm. When offering an objective summary of the law, the Justice Department's Office of Legal Counsel set forth the established construction of the statue which directly contradicts the interpretation that department has

adopted for the purpose of litigation.[6] The government's admission that the statute requires acceptance completely forecloses its argument here that a "plain reading" of the statute evinces no such requirement.

The government also attempts to argue that prior administrative decisions support the Eighth Circuit's opinion. The government's reliance on *In re Niesel*, 10 I. & N. Dec. 57 (BIA 1962), is misplaced. "*Niesel* simply held that the government appropriately disregarded a petitioner's designation and lawfully chose another country without *first inquiring* whether that country would accept the petitioner. Thus, *Matter of Niesel* addressed only the issue of an *initial* inquiry, not final acceptance of the country to which a person would be returned." Pet. App. 10a (Bye, J., dissenting) (quoting *Ali v. Ashcroft*, 213 F.R.D. 390, 403 (W.D. Wash. 2003)).

Respondent attempts to blunt the force of *In re Linnas*, 19 I. & N. Dec. 302 (BIA 1985) by arguing that, because the case arose in Second Circuit, the BIA was compelled to follow *Tom Man*. However, *Linnas* contains no indication that the BIA felt constrained to merely follow *Tom Man* and did not concur on the merits. That *Linnas* fails to mention *Niesel* demonstrates that *Niesel* is not on point. The BIA did not accept one rule for the Second Circuit and another for the rest

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[6] The government failed to disclose this Opinion to the Eighth Circuit, even though the case was pending before the Eighth Circuit for another three months after the OLC published the Opinion. Thus, the Eighth Circuit did not benefit from consideration of the OLC's affirmation of the courts' long standing interpretation of the statute when it ruled in this case. Respondent cites the paper now because it recently received a letter from counsel demanding an explanation for the divergent internal positions.

of the country.

In short, the government's argument that a "plain reading" of the statute supports the Eighth Circuit's ruling is simply untenable in the face of fifty years of contrary judicial authority and the government's own written admissions.

Second, a statutory interpretation of ask first but proceed if "acceptance is not forthcoming" requires a torturous reading that is far from "plain." Brief in Opp. at 13. The statute provides that immigration officials may disregard an alien's own country designation, but then must attempt removal to a country of which the alien is a subject national or citizen. 8 U.S.C. § 1231(b)(2)(D). The statute does not provide in step three, entitled "Additional Countries," that if acceptance is not forthcoming (e.g. the target country determines the deportee in fact is not its subject, national or citizen), that immigration officials may simply remove the person in the absence of acceptance or in the face of rejection. 8 U.S.C. § 1231(b)(2)(E). Rather, the legislative history of the statute is clear that Congress sought to provide immigration officials additional options of countries with a nexus to the deportee who might agree to accept the alien. Pet. at 15-16 (discussing legislative history).

Respondent further argues that Congress could not have intended that foreign governments could prevent the United States from sending deportees to that country without its acceptance. Brief in Opp. at 13. In fact, thousand of aliens with final removal orders remain in detention or under orders of supervision because the U.S. government does not recognize a certain government or because a government has failed to respond to requests for acceptance or refused to accept the alien. Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 (May 11, 1998). These aliens wait indefinitely, sometimes 10-15 years, for the conditions to become right for

their removal.

Finally, Respondent contends that the United States will not attempt to remove an alien to a country whose government is unwilling to receive the alien. Brief in Opp. at 14. However, citing the Eighth Circuit's holding in this case, the government in at least one case has done exactly that—removed a person to a country which explicitly refused to issue travel documents or grant acceptance. *See Abdulrahman v. Heston*, No H-02-0743, at 5 (S.D. Tex., June 9, 2003). Clearly, the issue is one that merits the Supreme Court's attention.

CONCLUSION

Respondent's Brief in Opposition fails to counter Petitioner's demonstration that a deep split in the circuits on an important question of national interest exists. The petition for a writ of certiorari should be granted so that the Supreme Court may resolve the opposing statutory interpretations.

Respectfully submitted,

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January 13, 2004

Supreme Court, U.S.
FILED
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(5)

No. 03-674

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 3, 2003
CERTIORARI GRANTED FEBRUARY 23, 2004

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 28, 2001—Petitioner's petition for writ of habeas corpus filed in United States District Court for the District of Minnesota.

July 9, 2001—Magistrate Judge's Order directing respondent to show cause why habeas corpus should not be granted.

July 30, 2001—Respondent's response to habeas corpus petition filed in District Court.

July 30, 2001—Respondent's motion to dismiss and memorandum of law in support thereof (with exhibits) filed in District Court.

September 7, 2001—Petitioner's memorandum in support of habeas petition and in reply to respondent's motion to dismiss filed in District Court.

September 28, 2001—Respondent's reply to the habeas corpus petition filed in District Court.

February 2, 2002—Report and Recommendation of Magistrate Judge recommending that petition for habeas corpus be granted.

February 22, 2002—Respondent's objections to Magistrate Judge's Report and Recommendation filed in District Court.

March 8, 2002—Petitioner's response to Magistrate Judge's Report and Recommendation filed in District Court.

March 31, 2002—District Court's Memorandum, Opinion, and Order granting habeas corpus petition.

April 3, 2002—Petitioner's motion to amend habeas petition and accompanying memorandum filed in District Court.

April 17, 2002—Respondent's memorandum in opposition to petitioner's motion to amend habeas petition filed in District Court.

April 29, 2002—Petitioner's reply memorandum in support of motion to amend habeas petition filed in District Court.

May 17, 2002—Respondent's Notice of Appeal to Eighth Circuit from District Court's March 31, 2002 Order and Opinion filed in District Court.

May 22, 2002—Magistrate Judge's Order granting motion to amend petition for habeas corpus.

May 22, 2002—Amended petition for habeas corpus filed in District Court.

May 23, 2002—Petitioner/Appellee's motion to dismiss appeal for lack of jurisdiction filed in Eighth Circuit.

May 31, 2002—Respondent/Appellant's opposition to petitioner's motion to dismiss appeal filed in Eighth Circuit.

June 6, 2002—Eighth Circuit Judge Order denying petitioner's motion to dismiss appeal.

July 12, 2002—Joint Appendix and Exhibit Volume filed in Eighth Circuit.

July 12, 2002—Respondent/Appellant's brief (with addendum) filed in Eighth Circuit.

August 1, 2002—District Court Order affirming Magistrate Judge's grant of petitioner's motion to file amended habeas petition.

August 13, 2002—Petitioner/Appellee's brief filed in Eighth Circuit.

August 26, 2002—Respondent/Appellant's reply brief filed in Eighth Circuit.

February 12, 2003—Case argued and submitted to Eighth Circuit.

May 27, 2003—Eighth Circuit Panel Judgment and Opinion.

June 4, 2003—Petitioner/Appellee's petition for rehearing and rehearing en banc filed in Eighth Circuit.

June 4, 2003—Report and Recommendation of Magistrate Judge that petitioner's amended habeas petition be denied and the action dismissed.

June 24, 2003—Petitioner's objections to the Report and Recommendation of the Magistrate Judge filed in District Court.

July 14, 2003—Respondent/Appellant's response to petition for rehearing and rehearing en banc filed in Eighth Circuit.

July 21, 2003—Respondent's reply to petitioner's objections to the Report and Recommendation of Magistrate Judge filed in District Court.

August 18, 2003—Certified copy of Eighth Circuit opinion and judgment received by District Court.

August 20, 2003—Petitioner/Appellee's motion to recall mandate and stay mandate pending filing of petition for certiorari filed in Eighth Circuit.

August 28, 2003—Eighth Circuit Judge Order denying motion to recall mandate and stay mandate.

October 24, 2003—District Court Memorandum, Opinion, and Order granting petitioner's application for writ of habeas corpus and ordering respondent to release petitioner under supervision.

October 24, 2003—Notice by respondent of intent to remove petitioner filed in District Court.

October 26, 2003—Petitioner/Appellee's renewed motion to recall mandate and stay mandate pending filing of petition for certiorari filed in Eighth Circuit.

October 26, 2003—Motion by petitioner in District Court to stay removal pending Eighth Circuit review of petitioner's renewed motion to recall the mandate.

October 26, 2003—District Court Order granting motion to stay removal pending renewed motion to recall the mandate in Eighth Circuit.

October 27, 2003—Respondent/Appellant's opposition to renewed motion to recall mandate and stay mandate pending filing of petition for certiorari filed in Eighth Circuit.

October 27, 2003—Petitioner/Appellee's reply in support of renewed motion to recall mandate and stay mandate filed in Eighth Circuit.

November 10, 2003—Eighth Circuit Judge Order granting motion to recall mandating and to stay mandate until disposition of petition for certiorari.

November 12, 2003—Notice of filing petition for writ of certiorari in United States Supreme Court received by Eighth Circuit.

November 17, 2003—Notice of filing petition for certiorari filed in District Court.

January 12, 2004—District Court Memorandum, Opinion, and Order directing respondent to release petitioner under supervision by January 19, 2004.

January 15, 2004—Respondent's Notice of Appeal to Eighth Circuit from District Court's January 12, 2004 Order filed in District Court.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
7850 Metro Parkway, Suite 320
Bloomington, MN 55425

Case A 71-689-585

In the Matter of Keyse Guled Jama

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on August 31, 2000. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decisions will become the official opinion in this case.

[ ] The respondent was ordered removed from the United States to _____.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $_____ with an alternative order of removal to _____.

[**X**] Respondent's application for asylum was ( ) granted (x) denied ( ) withdrawn.

[**X**] Respondent's application for withholding of removal was ( ) granted (x) denied ( ) withdrawn.

[**X**] Respondent's application for ~~withholding~~/deferral or removal under Article III of the Convention Against Torture is ( ) granted (x) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[**X**] Respondent's application for a waiver under section 209(c) of the INA was ( ) granted (x) denied ( ) withdrawn or ( ) other.

[**X**] Respondent's application for adjustment of status under Section 245 of the INA was ( ) granted (x) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other:_____.

Date: 8/31/2000

Appeal: (**X**) Applicant ( ) INS ( ) Both ( ) Waived

Appeal Due by: October 2, 2000

/s/ Joseph R. Dierkes
U.S. Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Bloomington, Minnesota

File No.: A 71 689 585

August 31, 2000

In the Matter of

KEYSE GULED JAMA,
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(2)(A)(i)(I) of the Immigration Act, in that you are an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude, or an attempt or conspiracy to commit such a crime.

APPLICATION: 1) Section 209 of the Immigration Act—adjustment of status, including an application for a waiver under Section 209(c) of the Immigration Act;
2) Section 241(b)(3) of the Immigration and Nationality Act—withholding of removal;
3) Relief under Article 3 of the Convention Against Torture.

ON BEHALF OF RESPONDENT:

John Keller, Attorney at Law

ON BEHALF OF SERVICE:

Daniel Pornschloegl, Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

1. INTRODUCTION AND PROCEDURAL SUMMARY

Respondent is a 21-year old single male, who is a native and citizen of Somalia, who entered the United States on or about February 27, 1996, as a refugee.

Removal proceedings were commenced on November 16, 1999 by the filing with the Immigration Court of a Notice to Appear, which is marked Exhibit 1. Respondent was charged with being subject to removal as an alien who had been convicted of a crime involving moral turpitude.

At a prior master calendar hearing held on June 5, 2000 at the prison at Stillwater, Minnesota, the respondent, through associate counsel, admitted the allegations in the Notice to Appear, and conceded the charge of removability. The Court would note that a subsequent pleading in this case involved a denial of allegation 4, while the charge remained conceded.

Based on the respondent's admissions, and based on the conviction documents in the record, the Court finds that removabilty has been established by evidence which is clear, convincing, and unequivocal. The respondent declined to designate a country for removal. The Court has designated Somalia. The respondent is an arriving alien having been effectively given a conditional entry into the United States as a refugee.

Regarding relief from removal, the respondent has filed two principal applications. He filed an application for withholding of removal and relief under the Torture Convention. The respondent is not eligible to seek asylum, as his conviction for 3rd degree assault for which he received

a sentence of one year and one day is an aggravated felony under Section 101(a)(43)(F) of the Act, namely a crime of violence for which the sentence imposed was one year or more.

The respondent has also filed an application for adjustment of status under Section 209 of the Immigration Act, accompanied by a waiver under Section 209(c) of the Act (Form I-602). Those applications were originally filed with the Immigration Service, and they were denied. The record of proceeding on those applications before the Service is included in Exhibit 8. The Court is treating those applications as a renewal before the Court. See 8 C.F.R. Section 209.2(b).

The respondent testified in support of his application, as did his uncle. Both sides offered additional documents.

2. GENERAL SUMMARY OF REFUGEE ADJUSTMENT, WITHHOLDING OF REMOVAL, AND TORTURE CONVENTION LAW

Aliens who are admitted to the United States as refugees are eligible to seek adjustment of status under Section 209 of the Immigration Act. For those aliens who are inadmissible to the United States pursuant to Section 212(a)(2) of the Act, they may seek a waiver of their inadmissibility under Section 209(c) of the Act, for reasons of humanitarian purposes, to assure family unity, or when it is otherwise in the public interests.

In applications for withholding of removal under Section 241(b)(3) of the Immigration Act, the respondent bears the evidentiary burdens of both proof and persuasion. To be eligible for withholding of removal, an alien must show a "clear probability" of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. This means that the respondent must establish that it is more

likely than not that he would be subject to persecution for one of the grounds specified.

For applications filed on or after April 1, 1997, the applicant shall also be considered for eligibility for withholding of removal under the Convention Against Torture if the applicant requests such consideration, or if the evidence presented by the alien indicates that the alien may be tortured in the country of removal. See 8 C.F.R. 208.13(c) (1). Eligibility for withholding of removal under the Convention Against Torture is set forth at 8 C.F.R. 208.16(c). The burden of proof is on the applicant to establish that it is "more likely than not" that he would be tortured if removed to the proposed country of removal.

"Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, for intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." See 8 C.F.R. Section 208.18(a). Torture is an extreme form of cruel and inhuman treatment, and does not include pain or suffering arising from lawful sanctions. The act must be directed against a person in the offender's custody or physical control.

In assessing whether it is more likely or not that an application [sic] would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence

of gross, flagrant, or mass violations of human rights within the country of removal, where applicable; and other relevant conditions in that country of removal. See 8 C.F.R. Section 208.16(c).

3. THE EVIDENCE PRESENTED

The respondent was the first witness to testify. He states that he was born on January 1, 1979 in Somalia. He arrived in the United States on February 27, 1996, as a refugee, and has never changed that status. He was born in Mogadishu. His mother is deceased, and his father is still living, residing here in the Twin Cities. The respondent has no children of his own, and never was married. Extensive testimony was taken regarding the respondent's criminal history. When first questioned about the number of times he was arrested in the United States, he stated that it was about five times, but he was not sure. His 1999 arrest in Wasika was covered. The respondent states that he was in his room, drinking alcohol at the time. He looked out the window and saw a friend of his getting beaten up outside by a number of other people. The respondent states that his friend was a member of Somali clan, the Darod. The individuals beating up his friend were members of the Hawiye clan. The respondent states that he went outside to break up the fight. His fellow Darod clan member ran away, and when police arrived on the scene, they arrested all the people remaining there, including the respondent.

Respondent states that in the course of the criminal proceedings relating to this arrest, his attorney encouraged him to plead guilty. The respondent states that he did not have a weapon at the time of the incident. He states also that he did not hurt anyone. Respondent claims that the other Darod clan member was the person who injured the attackers. The respondent states that no weapon was found on him. The respondent also states that his criminal lawyer told him that the Immigration Service would not come after him if he

plead guilty to the offense. The respondent ultimately identified the name of the other Darod clan member, the person who did the stabbing, as Abshir Mohamud. Respondent states that he told the police officers investigating the incident that Abshir Mohamud was the one committing the crime. The respondent testified regarding other criminal arrests in the United States. There was a 1997 arrest in Hennepin County that lead to a prior guilty plea on a theft charge. The guilty plea was set aside, and the respondent ultimately took the case to a jury trial. He was acquitted in the trial. The respondent states that he also had two or three drinking arrests. He states that his only arrest for fighting was on the assault charge in Wasika. The respondent initially denied DWI charges relative to his drinking. In fact, he did state that all of his criminal problems were always from his drinking in the United States. He has never had any alcohol treatment in this country, but states that he would now plan to get that treatment.

There were inquiries of the respondent on direct examination regarding discipline problems in prison. The respondent definitely attempted to minimize the seriousness of these discipline incidents. He states that they essentially arose from his being mistreated in prison, including allegations of racist treatment by guards. The respondent states that he was subject to a number of beatings during the course of his imprisonment. Ultimately, his prison sentence was extended to the point where he had to serve the entirety of that sentence.

Since the respondent has been at the jail in Rush City, approximately two months, he has not had discipline problems there. He states that he is attending classes at Rush City. The respondent held a number of jobs in the United States, including with a printer, with LSG Sky Chefs, and for a number of temporary services. None of these jobs were held for extended periods of time. Respondent states that he

had to change jobs because of his arrests related to the alcohol related incidents.

The respondent states that his immediate family is in Minnesota. His father, stepmother, and his brothers and sisters all live in Eden Prairie, a suburb of the Twin Cities. The respondent's biological mother died when he was young. The respondent states that he has had a lot of problems with his stepmother. He described her as the person who taught him to drink. He says that she put him out of the family home. After being removed from the family home, he went to live with his uncle, Mohamud Musee Jama. This is in a house owned by the respondent's aunt, the sister of Mohamud Musee Jama. The respondent stated that he lived with his uncle for about eight months to one year.

The respondent was questioned regarding who from his family would be present in court. His uncle did appear and testify. Respondent stated that he thought his father would be there. Ultimately, no other family members appeared. The respondent states that he had received a letter from his brother Abdi, but he had left that letter in the jail. The respondent states that if he were to be released from custody, he would go to live with his brother, Abdi.

The respondent was 12 years old when he left Somalia. He has minimal recollections of that country, other than seeing dead bodies, and damage to buildings in the course of leaving that country. The respondent is a member of the Darod clan, Dholbohorite subclan. The respondent states that his family left Somalia because of clan related reasons. They traveled to a refugee camp where they remained for an extended period of time. The family had lived in a house in Mogadishu. Respondent states that he has no family members to return to in Somalia at this time.

On cross-examination, the Immigration Service attorney brought out a number of other arrests relating to the respondent. The Service attorney produced a printout from

the Hennepin County courts listing 12 arrests for the respondent in Hennepin County alone. Service counsel went through the arrests more or less individually, and the respondent acknowledged some of the arrests, but could not remember others. He remembered a theft arrest in November 1997 in Bloomington. He also recalled an arrest for criminal damage to property. He could not recall two prior arrests in 1997 and 1998 for 5th degree assault. After being questioned regarding these arrests, the respondent ultimately stated that he had had many arrests in Hennepin County, and couldn't remember all of them.

Regarding the Wasika case that resulted in the 3rd degree assault conviction, the respondent again denied having assaulted or injuring anybody. It was pointed out to him on page 51 of Exhibit 2 that in the plea transcript he had admitted that he had injured one other person. The respondent now denies having injured anyone, and states that he simply said that to the trial judge to get released from custody. He states that he also blames his probation officer in that proceeding for problems that resulted in his being sentenced to one year and one day.

The respondent was questioned further regarding other incidents leading to arrests in Wasika. He believes that he has four arrests in Wasika, the 3rd degree assault, and three for underage drinking. He also acknowledged that there was an April 25, 1999 DWI arrest in Wasika.

The respondent states that after coming to the United States in early 1996, his father moved out of the family home in about August of 1996. The respondent last saw his father in February of '99, and last talked with him on the phone about two months ago. He last saw any of his siblings in January of 1999. One of the siblings apparently sent him money while respondent was in prison. The respondent's uncle was the only person who visited him during his time in prison.

There was testimony regarding the discipline problems set out for the respondent while incarcerated. He denies having assaulted or threatened any guards. He states that he would initially have been eligible for release from prison on February 20, 2000. Because of his disciplinary problems, he had to serve his complete sentence, and was not released until June 22nd. He denies having tried to elbow one of the guards. Ultimately, the respondent denies all of the disciplinary charges brought against him.

In response to questions from the Court, the respondent states that he really has no explanation for why he has so many arrests and criminal charges in the approximately four years that he has been in the United States. Regarding the night of the assault incident in Wasika, he states that he had had seven beers to drink along with a large bottle of vodka. He has no real explanation for why he was blamed for the stabbings, when. they were in fact carried out by an entirely different person. He does state that the people who were stabbed blamed him because he was present. The Court asked the respondent if during his interviews by the police following the stabbing if he had identified the person who had actually done the stabbings, Mohamud Abshir. The respondent could not recall if he told the police about that.

The other witness to testify was Mohamud Jama Musee, the respondent's uncle. The respondent is the son of this witness' brother. The witness came to the United States in 1994 as a refugee, and now is a United States citizen. He works as a teacher at Roosevelt High School, and is involved in other Somali community activities.

The witness stated that the respondent had in fact had problems with the respondent's parents in the United States. The respondent wanted to get out of the family home because the respondent did not want to comply with the rules there. The respondent's family wanted him to stay, but he left

nonetheless. The respondent has resided with the witness and the witness' sister on two occasions in the United States.

The witness states that when the respondent's family was in Somalia, the respondent's father suffered an injury in Baidabo, when the father was shot in the arm. One relative had some connection to Siad Barre, and was also killed in the civil war. The witness was asked what he thought the respondent might encounter on returning to Somalia. He states that the respondent would face dangers in that country. He described the respondent as not being a person of "tolerance", and stated that he was concerned that the respondent could get involved with the wrong type of people in Somalia.

In response to questions from the Court, the witness stated that the traditional area of the Dholbohonte subclan of the Darod clan is near Lascanood, which is in the northern region of Somalia. The witness states that there has been some fighting in that region, but states that it is different than Niogadishu.

The Court will note the following from the Exhibits in this case: Exhibit 2 is a Service submission that includes a number of background documents on the respondent's criminal record. The respondent was interviewed on March 17, 1998 regarding his inspection for his admission as a refugee. The respondent describes the incident relating to what the Court interprets to be his prior conviction, now set aside, for the auto theft. The respondent states at page 2 of the Exhibit that it involved a tribal fight between Somalis. Ultimately, the respondent was charged with stealing a car. He states that he was told by his lawyer at that time that if he admitted he stole the car, he would be released. Respondent states that he really did not steal the car, as he was in effect driving it with the consent of the owner. He does acknowledge that there was a fight among some of the people who were at a club on that night.

Most of the balance of the exhibit relates to the respondent's 3rd degree assault conviction. The more complete copy of the complaint in this case is at Exhibit 12. This reflects that the incident took place at 4:07 in the morning on June 15, 1999. The police were called to the scene of the crime, and spoke with three Somali injuries who had suffered from stab wounds. One individual was stabbed in the back of his right shoulder. Another had been stabbed on his right hand and right bicep. The third person had been stabbed in the left forearm. The stabbing victims were transported by ambulance to a local hospital. The complaint reflects that all three of the victims identified the respondent as the person who had stabbed them. Returning to Exhibit 2, the initial disposition of the case is set out at page 6. The respondent plead to a charge of 3rd degree assault, and was given a suspended sentence of one year and one day. In fact, execution of this sentence was suspended. A requirement of the suspended sentence was that the respondent serve 180 days in jail, and he was placed on probation for up to three years. There were a number of conditions of the probation, including no use of alcohol. Further, the respondent was not to have any direct contact with the victim, victim's family, or a Faye Abraham. Included in the exhibit are both the plea and sentence transcript. The plea transcript begins at page 42, and took place on September 8, 1999. It is noted that there were some other cases pending against the respondent at the time, and they were disposed of at that time as well. As noted on page 46, the respondent also pleaded guilty to a charge of obstructing legal process, apparently related to some refusal to take a breathalyser. The respondent plead guilty to the 3rd degree assault charge as noted on page 47. At the bottom of page 48, it is noted the respondent acknowledged that no threats or promises were made to him to enter the guilty plea. On that page he states, "I believe that I am guilty." At the top of page 49, he states that no one forced him to plead. Starting at the bottom of page 49, the respondent states that he was involved in a fight on that day.

He denies having used a knife or having stabbed one of the victims. However, he does acknowledge that he committed an assault which inflicted substantial bodily harm on one of the victims. Starting at the bottom of page 52, the prosecutor notes that one of the victims was suffering from what appeared to be a stab wound. The respondent, at page 53, acknowledges that he injured the victim, but does not know what type of injury the victim suffered. The sentencing transcript begins at page 7. This sentencing took place on October 6, 1999. It is noted initially on page 8 of the exhibit that on September 15th, the respondent was picked up in Hennepin County and charged with disorderly conduct in an incident involving alcohol. It appears that the respondent was using alcohol during the period of time between his guilty plea and sentencing. It is noted on page 16 that on September 16th, the probation officer received a call from Human Services indicated that the respondent was in the Human Services offices, and he was intoxicated. At page 30 of the exhibit, the prosecutor notes for the court's information that a felony conviction for the respondent would put him at serious risk of deportation.

The court actually pronounced it's [sic] sentence beginning at the bottom of page 34. The respondent was committed to the Commissioner of Corrections for one year and one day. The sentence was suspended, subject to probation. The respondent was required to serve "county jail time of 180 days".

The Court would now note Exhibit 13, which reflects a November 1, 1999 probation violation hearing on the same case. The reason for the probation violation was that the respondent was found to be intoxicated on October 21, 1999, shortly after he was released after finishing his required county jail time. This was a violation of probation. The court found that the violation was intentional and not excusable. The trial judge noted that "it is obvious to this Court that you have no intention of following any

probationary terms regardless of the conditions that may be imposed on you * * * This Court is further of the opinion that to not revoke your probation would undermine the seriousness of the conviction for which you are appearing today." The court went on to execute the one year and one day sentence. Going back to page 6, the respondent stated that he did not want to go to prison or jail. He stated, "If you can put me on probation, that would be fine, otherwise, transfer me to the Immigration Court and let them take me to Somalia." At page 9 he again requests to be sent to the "Immigration jail". At page 11, it is noted that a restitution for the victims would involve a $771 ambulance bill and a $435 medical bill. The Court notes that it overlooked a statement at page 33 of Exhibit 2. This reflects that the prosecutor did contact the victim of the crime who states that he was "almost paralyzed on my hand". The victim states that he has lost a job as a result of the hand injury. The victim went on to tell the prosecutor that "Mr. Jama is going to kill someone some day, and he's (the victim) really concerned with his safety and others, and he said that there is almost $2,000 worth of hospital bills that are piling up." At page 31 of that exhibit, it was noted that the respondent had a thorough psychological evaluation and chemical dependency evaluation when he had been at the St. Peter, Minnesota facility.

Exhibit 4 is respondent's Form 1—589. This document essentially states that respondent's family left Mogadishu when he was 11 or 12, and he did not have a very good memory of what happened. He states that his family were Darod clan members, and that was the cause of their problems. He states that he would be attacked by opposing clans if he were returned to Somalia.

Exhibit 6 includes records of the Division of Human Services. There is a note under date of March 26, 1996 reflecting that the respondent was a single male applying for benefits. He had arrived in the United States February 27,

1996, and was currently living with a non-related roommate. At page 10 of that exhibit it was noted by December 13, 1996, the respondent was living in Memphis, Tennessee. He apparently returned to the Twin Cities within two months of going to Memphis.

Exhibit 7 is additional documentation submitted by the respondent. Included in the exhibit is the Amnesty International report for Somalia for the year 2000. This notes that there was continued fighting in Somalia, especially in the south of the country. Famine within parts of the country was already noted. It is further noted that Somaliland in the northwest of that country is enjoying relative stability and a functioning administration. Likewise, in the Puntland region of northeastern Somalia, some administrative structures were in place as well.

Starting at page 18 is a UNHCR update on conditions in Somalia dated September 1999. This notes that fighting between clan factions has continued in the southern and central parts of Somalia. It also notes that repatriation of Somali refugees from Ethiopia has continued in 1999. These refugees are being returned to the Somaliland region of the northwestern part of that country. Sixty thousand Somali refugees from Ethiopia have returned there since late 1997. At page 42 is the U.S. State Department Consular Report, on Somalia, specifically a travel warning. The State Department notes that interclan fighting continues in that country. However, the report notes that parts of the north of Somalia including the self-declared republic of Somaliland is relatively peaceful.

Exhibit 9 is documentation submitted by the respondent reflecting that his 1997 conviction on the auto theft charge was set aside, and he ultimately was acquitted by a jury. His acquittal was in June of 1998. The Court would note that back in Exhibit 2 is documentation showing that the conviction was set aside April 9, 1998, based on the

respondent not being properly advised of the Immigration consequences of the conviction. See pages 65 and 66 of Exhibit 2. The Court would note at page 4 of Exhibit 9 that on July 18, 1997 the respondent's conditional release on that charge was revoked because it is reported that he threatened the victim. A bench warrant was issued for him at that time.

Exhibit 10 is the Service submission that lists the respondent's arrests and criminal cases in Hennepin County (Minneapolis), Minnesota. These reflect four assault arrests, and another arrest for simple robbery. The other arrests include disorderly conduct, trespassing, and criminal damage to property.

Exhibit 10 includes the respondent's disciplinary records from the Minnesota Correctional System. Simply put, these documents reflect the respondent engaging verbal abuse of prison employees, including serious threats directed against the prison employees. The respondent was subjected to numerous violation reports, which ultimately resulted in him losing all his good time in prison, and his being required to serve the entirety of his sentence. The respondent was transferred from lower security institutions up to the Oak Park Heights Prison, which is the highest security classification prison in the Minnesota system.

4. ANALYSIS

Removability is not in dispute in this case. Although the respondent did withdraw his admission of allegation 4 in the Notice to Appear, his conviction for the 3rd degree assault offense still provided a basis for him to concede removability. The only issues remaining for consideration by the Court relate to whether or not the respondent qualifies for any relief from removal.

The respondent is not eligible to seek asylum because he has been convicted of an aggravated felony relative to the assault 3rd degree charge. See Section 208(b)(2)(B)(i) of the

Immigration and Nationality Act. The remaining forms of relief sought by the respondent are adjustment of status under Section 209 of the Act with a waiver under Section 209(c), withholding of removal under Section 241(b)(3) of the Act, and relief under the Torture Convention.

The Court will initially comment on the credibility of the respondent. The respondent's testimony regarding his criminal record was rather vague. He grossly understated the number of arrests that he has had in the United States. The respondent stated that virtually all of his criminal related problems related to drinking. Considering that, the Court finds that his testimony regarding the specifics of the underlying circumstances of his criminal record is very questionable, at a minimum, affected by his intoxication during a number of these instances. The Court would also note that a recurring theme in the respondent's testimony is that he has never really done anything wrong. He has blamed the crimes for which he was charged on the actions of other people, including blaming the stabbings on the assault offense to an individual named Abshir Mohamud. However, the respondent can't recall if he ever mentioned to the police that a third party had committed the crimes. Further, the respondent plead guilty to that offense, and stated that he was not coerced into entering that plea. He now advises this Court that he lied to the criminal judge by admitting the commission of the crime simply to be released from custody.

Further, he blames a number of problems on lies carried out by probation officers, police officers, and prison guards. In effect, the respondent challenges the voracity of virtually everyone he has come to deal with in the criminal justice system, including the lawyers who previously represented him. When the record shows that a large number of people are accused of lying by one individual, that significantly calls into doubt the credibility of that one individual. The Court accordingly has serious doubts about the credibility of the respondent's testimony.

The Court will first discuss the respondent's application for adjustment of status under Section 209 of the Act, with the attendant waiver under Section 209(c). That section provides that certain criminal grounds of inadmissibility may be waived for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. The Court would note that the record in this case discloses no public interest whatsoever in the respondent's continued presence in the United States. He has not identified any real contributions to the community of any kind that would justify such a waiver.

Regarding family unity, this is a most remarkable case. The respondent has numerous close family members in the United States, including father and siblings. None of them have appeared to testify on the respondent's behalf, nor have they submitted anything in writing to support his claim. The respondent blames this problem on a bad relationship with his stepmother. However, the testimony of respondent's uncle is that the respondent is the one who chose to leave the family home because he didn't wish to follow the rules there. What it comes down to in this case is that the respondent really has not established a basis for a family unity waiver here.

Regarding humanitarian purposes, the Court believes it is appropriate to balance the humanitarian factors in the case with the negative factors. An appropriate standard for considering such an application would be that generally set forth in the Board's decision in Matter of Mann, 16 I&N Dec. 581 (BIA 1978). The Court should balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented on his behalf. What we are dealing with in the present case is a respondent who has not been in the United States for a very long period of time, who has been convicted of several offenses, including a very serious assaultive offense, which according to the complaint involves a knife. Obviously,

some serious injury was inflicted on the victims, as all of them were suffering from stab—type wounds and were treated at hospitals. While respondent denies that he used a knife, and for that matter denies ever hurting anyone, his admissions to the criminal court contradict that. What is apparent from the record in this case is that this respondent has a significant disregard for the laws of this country. He was given what this Court considers a very favorable treatment by the criminal court on the assault charge, including a grant of probation. The respondent immediately violated his probation conditions when released from custody, and then had the one year and one day sentence imposed upon him. The respondent has no substantial employment record, having switched jobs frequently based on his alcohol related arrest problems. As noted previously, his family ties are minimal, and there is absolutely no record of a rehabilitation. His extremely negative prison discipline record is part of the evidence in this case as well. Simply put, the respondent really has very minimal favorable factors going for him. The Court acknowledges the respondent was admitted to the United States as a refugee, but that in and of itself is not a basis to overcome all of the negative factors in this case. The Court believes in the exercise of discretion the respondent's application for a waiver under Section 209(c) of the Act should be denied based on his dreadful record over the short period of time that he's been in the United States. Because the waiver is denied, the application for adjustment of status would be denied as well.

Turning to the next form of relief sought by the respondent, we are dealing with withholding of removal under Section 241(b)(3) of the Act. That form of relief will not be available to an individual who has been convicted by a final judgment of a particularly serious crime. See Section 241(b)(3)(B)(ii) of the Immigration Act. The evidence in this case reflects that the respondent was convicted of assault in the 3rd degree. The complaint in this case reflects that three

individuals were stabbed during the incident. The leading Board case on this issue of whether or not a crime should be viewed as particularly serious is Matter of Frantescue, 18 I&N Dec. (BIA 1982). That case stands for the proposition that every crime should be considered on a case by case basis on making the assessment. In judging the seriousness of the crime, the Court should look to such factors as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community. Crimes against persons are more likely to be categorized as "particularly serious crimes".

In the present case, the crime to which the respondent plead guilty is an assaultive crime, clearly a crime involving danger to persons. Regarding the underlying circumstances of the crime, the complaint reflects that three individuals were stabbed. The type of sentence imposed originally by the court was a period of six months in the County jail, followed by three years probation. Because the respondent immediately violated his probation, the original sentence of one year and one day was executed. Because of the respondent's discipline record in prison, he was required to serve the entirety of that sentence.

Regarding the issue of whether the respondent would be a danger to the community, the Court feels that it is very important to note that the respondent had consumed a large amount of alcohol on the night of this offense. Specifically, he states that he drank seven beers and a large bottle of vodka. The respondent has stated that virtually all of his criminal problems in the United States arise from his consumption of alcohol. The respondent, upon being released from his County jail time after his sentencing by the trial court, immediately went back to consuming alcohol. The criminal court concluded that this respondent would not comply with the conditions of probation, specifically the

prohibition of drinking. Considering this respondent's history of drinking, then getting into assaultive situations, including one where individuals were stabbed, the Court can come to no other conclusion but that this respondent would be a danger to the community. Accordingly, the Court will find that the respondent has been convicted of a particularly serious crime, and is barred from the relief of withholding of removal.

The remaining form of relief would be deferral of removal under Article 3 of the Convention Against Torture. Because the respondent has been convicted of a particularly serious crime, he is not eligible for withholding of removal pursuant to Title 8 C.F.R. 208.16. The relief that remains available to him is that under 8 C.F.R. 208.17. The Court would consider that this discussion would also have some bearing on the application for withholding under Section 241(b)(3) of the Act should the respondent have not been barred from seeking that relief.

The Court acknowledges that membership in a clan in Somalia can provide the basis for a claim for membership in a particular social group to seek relief under the persecution laws. The leading Board decision is Matter of H-, 21 I&N Dec. 337 (BIA 1996). In the present case, we are dealing with a respondent who is a member of the Darod clan, but is a member of the Dholbahonte subclan. The essence of the Board's decision in Matter of H- related to the dangers that a Mareehaan subclan member of the Darod clan faced in Somalia after the outbreak of the civil war in 1991. It is clear that the background documentation on Somalia at that time reflected that the Mareehaan were a particular target of the Hawiye clan, or United Somali Congress in the period around the fall of the Siad Barre regime. The respondent in the present case fled Mogadishu with his family members, and has really not provided any evidence reflecting that he was personally subjected to what would amount to past

persecution. Simply put, his family fled before they were subjected to any specific mistreatment.

The Court would note that the Dholbahonte subclan has its home area of Somalia a significant distance away from Mogadishu, in the Lascanood region in the northern portion of that country.

The northern portion of Somalia is definitely a more stable and peaceful region of that country at this time. The Court has not found any documentation that would reflect that the Dholbahonte subclan is currently the target of mistreatment by any other specific clan groups in Somalia. The Court would note that one of the factors to be considered in assessing a Torture Convention claim is whether or not an applicant could relocate to a part of the country of removal where he or she is not likely to be tortured. The testimony of the respondent and his uncle reflect that they are members of the Dholbahonte subclan. The Dholbahonte are part of the Dared clan. The Darod's are one of the largest clan groups in Somalia, and could not realistically be described as a minority group, such as the Midgan, Brawan, or other recognized minority or caste groups in that country. The fact that the respondent would have available to him an area that appears to be under the control of his subclan is a significant factor in this case. The fact that there is also no definitive evidence showing that the Dholbahonte are a specific target of any groups in Somalia is likewise relevant.

A further concern that the Court has with the availability of Torture Convention relief to the respondent is the fact that there really is no central government operative in Somalia at this time. Some of the regions of northern Somalia are under the control of localized governmental organizations, none of which have been internationally recognized. There is no evidence in the record that any of these governmental groups in Northern Somalia would be inclined to torture this respondent. It is a significant burden of proof on the

respondent to establish that it is more likely than not that he would be subject to torture. The Court cannot find based on the evidence in this case that respondent has established that he would be tortured by any governmental group or by a person acting in any official capacity. The respondent simply has not met his burden of proof to establish eligibility for relief under the Torture Convention. That application will be denied.

There is no other relief available to the respondent. The following orders will be entered in this case:

1) The respondent is found to be removable from the United States as charged in the Notice to Appear.

2) The respondent's application for a waiver of inadmissibility under Section 209(c) of the Act is denied.

3) The respondent's application for adjustment of status under Section 209 of the Act is denied.

4) The respondent's application for withholding of removal is denied, based on the respondent having been convicted of a particularly serious crime.

5) The respondent's application for relief under the Convention Against Torture is denied.

6) The respondent is ordered removed from the United States to Somalia.

JOSEPH R. DIERKES
Immigration Judge

U.S. Department Of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A71 689 585 – Bloomington Date: May 9, 2001

In re: KEYSE, GULED JAMA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF SERVICE: Daniel J. Pornschloegl
Assistant District Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(I)] – Crime involving moral turpitude

APPLICATION: Withholding of removal; Protection under the Convention Against Torture; Adjustment of status; Waiver pursuant to section 209(c) of the Immigration and Nationality Act

ORDER:

PER CURIAM. The appeal is dismissed. We grant the respondent's appeal fee waiver request and consider this appeal without payment of fee. *See* 8 C.F.R. § 3.8(c).

We have reviewed the record of proceedings, the Immigration Judge's decision of August 31, 2000, and the contentions on appeal. We find that the Immigration Judge's decision accurately sets forth the facts asserted by the respondent in support of his claims and correctly concludes that the respondent has failed to demonstrate that he merits the requested relief. We also find that the Immigration Judge adequately and correctly addressed the issues raised on appeal. The claims on appeal are without merit. The Immigration Judge's decision is therefore affirmed for the reasons set forth in that decision.

/s/ Edward R. Grant
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
Executive Office For Immigration Review

Board of Immigration Appeals
Office of the Clerk

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

*S-JAMA, KEYSE GULED
INMATE #: 203857 A71 689 585
INMATE HOUSING: MSA
1145 Shenandoah Lane
Plymouth, MN 55447-0000

Office of the District Counsel/SP
P.O. Box 11898
St. Paul, MN 55111-0898

Name: *S-JAMA, KEYSE GULED

A71-689-585

Date of this notice:
05/09/2001

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very truly yours,

/s/

Lori Scialabba
Acting Chairman

Enclosure

Panel Members:
COLE, PATRICIA A.

GRANT, EDWARD R.
THOMAS, ELLEN K.

ENTERED MAY 16, 2001

U.S. Department of Justice
Immigration and Naturalization Service

Warrant of Removal/Deportation

File No.: A71 689 585

Date: May 25, 2001

To any officer of the United States Immigration and Naturalization Service:

Keyse Guled JAMA
(full name of alien)

who entered the United States at or near New York, New York (place of entry) on or about 2/27/1996 (date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

☒ an immigration judge in exclusion, deportation, or removal proceedings
☐ a district director or a district director's designated official
☒ the Board of Immigration Appeals
☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the

United States the above-named alien, pursuant to law at the expense of:

THE APPROPRIATION, "SALARIES AND EXPENSES, U.S. IMMIGRATION AND NATURALIZATION SERVICE, 2001," INCLUDING THE EXPENSES OF AN ATTENDANT, IF NECESSARY.

/s/ Dean Hove
(signature of INS official)

Deputy District Director
(Title of INS official)

May 25, 2001
Bloomington, MN
(date and office location)

U.S. Department of Justice
Immigration and Naturalization Service

Warning to Alien Ordered Removed or Deported

File No.: A71 689 585
Date: May 25, 2001

Alien's full name: Keyse Guled JAMA

In accordance with the provisions of section 212(a)(9) of the Immigration and Nationality Act (Act), you are prohibited from entering, attempting to enter, or being in the United States:

☐ For a period of 5 years from the date of your departure from the United States because you have been found deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated upon your arrival in the United States as a returning lawful permanent resident.

☐ For a period of 10 years from the date of your departure from the United States because you have been found:

☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated as a result of your having

been present in the United States without admission or parole.

☐ deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in accordance with section 238 of the Act, by an immigration officer, a judge of a United States district court, or a magistrate of a United States magistrate court.

☐ For a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported, or removed from the United States, you have been found:

☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in proceedings under section 238 of the Act.

☐ deportable under section 241 of the Act and ordered deported from the United States by an

immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☐ to have reentered the United States illegally and have had the prior order reinstated under section 241(a)(5) of the Act.

☒ At any time because you have been found inadmissible or excludable under section 212 of the Act, or deportable under section 241 or 237 of the Act, and ordered deported or removed from the United States, and you have been convicted of a crime designated as an aggravated felony.

After your removal has been effected you must request and obtain permission from the Attorney General to reapply for admission to the United States during the period indicated. You must obtain such permission before commencing your travel to the United States. Application forms for requesting permission to reapply for admission may be obtained by contacting any United States Consulate or office of the United States Immigration and Naturalization Service. Refer to the above file number when requesting forms or information.

WARNING: Title 8 United States Code, Section 1326 provides that it is a crime for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States during the period in which he or she is barred from so doing without the Attorney General's consent. Any alien who violates this section of the law is subject to prosecution for a felony. Depending on the circumstances of the removal, conviction could result in a sentence of imprisonment for a period of from 2 to 20 years and/or a fine of up to $250,000.

_____	Deportation Officer	St. Paul District Office
(Signature of officer serving warning)	(Title of officer)	(Location of INS office)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Civil No. 01-11720 JRT/AJB

DECLARATION OF DETENTION
ENFORCEMENT OFFICER ERIC O'DENIUS

I, Eric O'Denius, a Detention Enforcement Officer from the Office of Detention and Deportation in the St. Paul District of the United States Immigration and Naturalization Service ("INS"), hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information and belief:

1. In performing my duties as a detention enforcement officer, I am assigned the primary responsibility of organizing and scheduling all alien removals originating from the St. Paul District Office. In that capacity, I regularly make flight arrangements and oversee the acquisition of all Department of Justice, Department of State, and foreign clearances.

2. I have been involved in making final arrangements for the removal of 14 Somali nationals originating from the St. Paul District Office. (See Attachment). The selection of the destination city within Somalia is largely left to the alien's discretion. A Somali national may select from the cities of Bossaso, Berbera, Hargeysa, or Mogadishu for their removal. The fare from Minnesota to any of these cities is about the

same, which is paid for at Government expense. Of the 14 Somali nationals removed from the St. Paul District Office since 1999, all were removed to the city of their choice: one (1) to Mogadishu (via Berbera); three (3) to Berbera; and the remaining ten (10) to Hargeysa.

3. Sample schedules for removal to Bossaso, Berbera, Hargeysa, or Mogadishu, Somalia are as follows:

For Berbera, Bossaso, Hergeysa, or Mogadishu:
- Sat 1630 Depart Chicago (alien & INS)
- Sun 0830 Arrive Stockholm (alien & INS)
- Sun 1050 Depart Stockholm (alien & INS)
- Sun 2030 Arrive Dubai (alien & INS)
- Mon 0400 Depart Dubai (alien)
- Mon 0600 Arrive Berbera (alien)
- Mon 0700 Connecting flights depart (alien)
- Mon 1000 Last connecting flight arrives (alien)

For Mogadishu: (no stop in Berbera):

- Thu 2100 Depart New York (alien & INS)
- Fri 1530 Arrive Jeddah (alien & INS)
- Fri 2350 Leave Jeddah (alien & INS)
- Sat 0340 Arrive Nairobi (alien & INS)
- Sat 0700 Leave Nairobi (alien)
- Sat 0900 Arrive Mogadishu (alien)

4. When preparing for the removal of a Somali national, the INS issues the alien a Form I-269, Certificate of Identity. (See Attachment). This document is issued for aliens of any nationality where a national passport or other form of travel document cannot be obtained for travel. Form I-269 is also used by INS Inspectors when an alien is to be removed or excluded at airline carrier expense and the alien has no documentation of his own. All of the foreign governments whose territories are listed as transit sites in the previously discussed sample schedules for removal to Bossaso, Berbera,

Hargeysa, or Mogadishu, Somalia, have accepted these documents as valid, with our guarantee of onward travel.

5. After a Somali national is notified of the INS intent to execute a warrant of removal to Somalia, and after the alien selects a destination city, flight arrangements are made accordingly. When a travel itinerary has been drafted, the INS then issues a Request for Country Clearance through INS Headquarters, International Affairs Office. This Request for Country Clearance is issued to the Secretary of State – Office of Diplomatic Security, all U.S. Embassies which would be involved in the proposed removal (including those in any countries through which the alien will transit), and INS Headquarters – Detention and Deportation Section. Attached is a copy of a Request for Country Clearance issued in connection to an unrelated Somali National who was removed to Somalia in March of 2001 as well as a detailed explanation of abbreviations and acronyms used. (See Attached).

6. Removal of an alien is not actually commenced until the St. Paul District Office receives country clearance approval through the Department of State. Upon receipt of the Request for Country Clearance, the State Department prepares a cable that is sent to U.S. Embassies in all countries through which the alien and INS officers will transit. All U.S. Embassies must approve. Attached is an example of a country clearance approval issued in connection to the case of an unrelated Nigerian National. (See Attachment).

7. At the time of removal, INS officers carry U.S. passports and any visas required for transit. All country clearance cables and Form I-269 Certificate of Identity are presented on behalf of the alien. A minimum of 2 officers are required for all overseas escorts. At least one officer must be the same gender as the alien. If more than two aliens depart, a third officer must be present.

8. Of the 14 Somali nationals removed from the St. Paul District Office since 1999, the local government has accepted every Somali national we have sent back. The State Department, the INS Office of International Affairs, and Headquarters/INS, any of whom may veto a proposed removal, have not denied our requests for removal of Somali Nationals.

17 July 2001
Date

/s/ INS DED #1491
ERIC O'DENIUS
Detention Enforcement Officer
U.S. Immigration and Naturalization Service
Office of Detention and Deportation
2901 Metro Drive, Room 100
Bloomington, MN 55425

DATE OUT	A-NUMBER	NOTES
8/28/99	A74 621 108	
8/28/99	A75 592 879	
9/25/99	A76 802 710	
12/18/99	A74 674 014	FEMALE
12/18/99	A40 446 831	
3/18/00	A70 397 177	
3/18/00	A75 328 133	
4/8/00	A70 376 614	
4/29/00	A74 816 136	
4/29/00	A70 377 302	
7/29/00	A70 366 834	
7/29/00	A75 016 797	
1/14/01	A70 396 123	DENVER ASSIST
3/10/01	A70 367 180	

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

File No.: A
Date: April 9, 1998

CERTIFICATE OF IDENTITY

To facilitate transportation to
All applicant whose photograph appears below.

NAME:

DATE & PLACE OF BIRTH:

NATIONALITY: SEX:

OCCUPATION OR
PROFESSION:

MARITAL STATUS:

PRESENT ADDRESS:

PURPOSE OF JOURNEY: For travel to _____
A national passport or any form of travel document cannot be obtained for travel to that country.

PERSONAL DESCRIPTION

Height:

Weight:

Attach Photograph

Color of hair:

Color of eyes:

Identification marks:

For the U.S. Immigration and Naturalization Service

1.> REFERENCE: 01-0221-1248-ID: 910/RIT-NBO

FROM: JINS/HQIAO >2.

TO: AMEMBASSY MOGADISHU >3.
USINS/OIC NAIROBI
USINS/DD ROME

INFO: SEC STATE WASHDC/ROBHC
0624/CA/OSC/CCS/AF ROOM 4811HQ >4.
JINS/DDP WASHINGTON, DC

UNCLASS

SUBJECT: REQUEST FOR COUNTRY CLEARANCE

1. INS REQUESTS COUNTRY CLEARANCE FOR AN ESCORT DETAIL TO BERBERA, SOMALIA.

A. THE INS POINT OF CONTACT FOR THIS REMOVAL IS ERIC ODENIUS EXT 270; INS ST. PAUL; TEL#: 612-313-9060; FAX#: 612-313-9064. ADDITIONAL CONTACT IS BOB SHANNON; TEL#: 202-616-7800; FAX#: 202-514-0122.

B. ALIEN NAME/(SEX)/A#:----------/
(MALE)/A70 367 180.
ALIEN DPOB/TVL DOC: 10/1/1965;
SOMALIA/US CERT. D/IDENTITE A70367180 >5.

DEPORT GROUNDS (D/P CONVICTION): ---------
---
6. > ---

C. ESCORTING AGENTS: (NAME; TITLE; PASSPORT #; EXPIRY DATE)

LYLE BRABAZON; DETENTION; 801114809; 3/24/2003

PATRICK KENNEY; DETENTION; 801008415; 1/8/2002

D. TRAVEL ITINERARY: (AIRLINE, #; DEP CITY, DDATE (MDY), DTIME; ARR CITY, ADATE (MDY), ATIME)

AA-AMER, 80; ORD-CHICAGO, 3/10/2001, 4:55:00 PM; ARN-STOCKHOLM, 3/11/2001, 8:25:00 AM.

EK-EMIRATES, 6152; ARN, 3/11/2001, 10:50:00 AM; DXB-DUBAI, 3/11/2001, 8:15:00 PM. <7.

ESCORTS WITNESS DEPARTURE OF ALIEN FROM DUBAI ON NON-STOP FLIGHT AS FOLLOWS: <8.

D3-DAALLO, 189; DXB, 3/12/2001, 4:00:00 AM; BBO-BERBERA, 3/12/2001, 3:10:00 PM.

ESCORTS DEPART AS FOLLOWS: <9.

KL/KLM, 428; DXB, 3/14/2001, 9:30:00 AM; AMS-AMSTERDAM, 3/14/2001, 2:00:00 PM.

KL/KLM, 6055; AMS, 3/14/2001, 4:35:00 PM; MSP-MPLS/ST PAUL, 3/14/2001, 6:35:00 PM.

E. ESCORT DEPARTURE INFO: ESCORTS TO DEPART AS INDICATED ABOVE. UAE TRANSIT VISAS APPLIED FOR. SWEDISH TRANSIT PERMISSION ALSO APPLIED FOR. NOTE: THIS IS A RESCHEDULE OF PREVIOUS CLEARANCE. MECHANICAL DIFFICULTIES

ON FLIGHT 80 FROM CHICAGO PREVENTED COMPLETION OF DETAIL on 03/03/2001. <10.

2. NO EMBASSY ASSISTANCE REQUIRED. <11.

3. COUNTRY CLEARANCE IS REQUESTED FOR THE INS ESCORTS. THE ABOVE INFORMATION IS PROVIDED TO POST FOR APPROPRIATE LOCAL NOTIFICATIONS. FAX NOTICE OF THIS COUNTRY CLEARANCE TO INS CONTACT SHOWN ABOVE. SHOULD POST HAVE ANY QUESTION PERTAINING TO THE REMOVAL, PLEASE CONTACT INS POC DIRECTLY. RSO ASSISTANCE IS GREATLY APPRECIATED. <12.

_____

DIRECTOR, HQIAO

EXPLANATION OF COUNTRY CLEARANCE DOCUMENT

DRAFT

1. REFERENCE: A unique locator number with the overseas offices listed. RIT is for Rome District and NBO is the Nairobi sub-office.

2. FROM: INS, Headquarters, International Affairs Office.

3. TO: All Embassies involved. The US Embassy in Mogadishu is temporarily closed, so the nearest embassy – Nairobi – makes the arrangements.

4. INFO: Secretary of State, Diplomatic Security. Also, Headquarters DDP.

5. ALIEN DPOB/TVL DOC: With few exceptions, all international travelers must have a document verifying identity.

6. DEPORT GROUNDS: A courtesy to the receiving country.

7. ITINERARY: The airlines code deportees in the following manner:

DEPA: Escorted Deportee
DEPU: Unescorted Deportee
INAD: Inadmissible Alien (Carrier Responsibility)

Some airlines charge extra for DEPU aliens, because the carrier becomes responsible for ensuring that the alien arrives at his ultimate destination. The IATA (International Air

Transport Association) has developed uniform rules which cover the transport of deportees. It is the responsibility of INS to notify carriers that they will be booked deportees. The carrier knows the entry requirements for the countries they fly to as well and will not accept persons without approval from the receiving and transit countries.

8. WITNESS DEPARTURE: If the officers cannot go to the country of ultimate destination, they must witness the departure of the alien on a non-stop flight to the receiving country.

9. RETURN FLIGHT: As you can see, the officers are in Dubai long enough to be notified in case the alien is bounced back.

10. OTHER INFO: This is to let all parties know that we have carried out our responsibilities. These include: 1) US citizens must have a visa to enter the UAE. 2) Somali citizens must have an airside transit visa or consular approval to transit Sweden.

11. ASSISTANCE: Medical, psychiatric, afflicted, insane, or dangerous aliens. Also includes aliens where there might be media interest.

12. RSO: Regional Security Officer: attached to every US embassy or consulate worldwide.

FILE NAME:	COUNTRY CLEARANCE GRAFF AND KENNEY
DRAFTED BY:	LFE
CLEARED BY:	CPJ
APPROVED BY:	CDW
CLASSIFICATION:	UNCLASSIFIED
PRECEDENCE:	P

ACTION
ADDRESSEES: SECSTATE WASHDC

INFO: AMEMBASSY THE HAGUE
AMEMBASSY ROME
AMCONSUL FRANKFURT
AMEMBASSY ABUJA
AMCONSUL LAGOS

CAPTION LINE: ROME FOR INS
FRANKFURT FOR INS

TAGS: ASEC, CVIS, AMGT, CMGT

SUBJECT: COUNTRY CLEARANCE (GRAFF AND KENNEY)

REF: STATE 065084

1. Post welcomes the visit of Tim Graff and Patrick Kenney on April 09 and 10, pursuant to the deportation of alien ----------.

2. Notice of the deportation has been provided to the Amsterdam Schiphol Airport office of the Dutch Royal Border Police (Marechausee) (fax 31-20-603-8690).

3. Post Fraud Prevention Manager Chris Jester (tel 31-20-575-5336, fax 31-20-575-5310) is available should any assistance be required with this visit.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

KEYSE G. JAMA,
Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

Civil No. 01-1172 JRT/AJB

DECLARATION OF SCOTT BANIECKE ASSISTANT DISTRICT DIRECTOR FOR DETENTION, DEPORTATION, AND PAROLE

I, Scott Baniecke, Assistant District Director for the Office of Detention and Deportation in the St. Paul District of the United States Immigration and Naturalization Service ("INS"), hereby declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information and belief:

1. In performing my duties as Assistant District Director – Detention, Deportation, and Parole, I am responsible for overseeing the detention and removal of aliens in the St. Paul District Office. In that capacity, I regularly make custody/bond determinations and approve final the arrangements for alien removals.

2. I have been involved in making final arrangements for the removal of Somali nationals originating from the St. Paul District Office. My office's ability to remove aliens to Somalia is of special concern in light of the fact that Minnesota has the highest concentration of Somali nationals in the United States. Both the local media and Minnesota

State agencies have reported the Somali population in Minnesota to be between 26,000 and 50,000.

3. The St. Paul District Office currently has 146 Somali nationals who are currently subject to administrative orders of removal issued by the Immigration Court in Minnesota or the Board of Immigration Appeals in Virginia.

4. The St. Paul District Office regularly encounters Somali nationals who are subject to detention under the Immigration and Nationality Act (INA). Detention status is determined after considering flight risk, danger to public safety, and mandatory custody based on previous criminal convictions. From January 1998 through May 2001, the St. Paul District Office has initiated 75 new removal proceedings against Somali nationals detained in INS custody. (See Attachment). That is an average of nearly 2 new detained Somali cases per month.

5. In light of the number of Somali cases processed by my office, especially detained cases involving criminal aliens found to have committed "particularity serious crimes" (as defined by the INA), the prompt and orderly enforcement of final removal orders is of great importance.

7/17/01
Date

/s/
Scott Baniecke
Assistant District Director –
Detention, Deportation, and Parole
U.S. Immigration and Naturalization Service
2901 Metro Drive, Room 100
Bloomington, MN 55425

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 2-2324MNST

KEYSE G. JAMA,
Appellee,

v.

IMMIGRATION AND NATURALIZATION SERVICE,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

The motion to recall the mandate is granted and the mandate is stayed until the Supreme Court of the United States takes action on Mr. Jama's petition for certiorari.

(5362-010199)

November 10, 2003

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 18 2004
OFFICE OF THE CLERK

(4)

No. 03-674

IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner

QUESTION PRESENTED

Whether the Attorney General can remove an alien to one of the countries designated in 8 U.S.C. § 1231(b)(2)(E) without obtaining that country's acceptance of the alien prior to removal.

PARTIES TO THE PROCEEDING

The caption of this Petition contains the only named parties to the instant proceeding.

On March 1, 2003 the INS ceased to exist as an independent agency within the United States Department of Justice, and its functions were transferred to the Bureau of Immigration and Customs Enforcement in the newly formed Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 2, 101, 441, 442, codified at 6 U.S.C. §§ 101, 111, 251, 252.

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Somalia: Man Deported from U.S. Killed in Mogadishu, BBC WORLDWIDE MONITORING, May 14, 2002, *available at* LEXIS, MDEAFR Library, BBCMIR File 6,-7

Travel Warning – Somalia, DOS, Bureau of Consular Affairs, Oct. 31, 2003, *available at* http://travel.state.gov/somalia_warning.html 5

United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, as incorporated by Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223 42-43

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a) is reported at 329 F.3d 630. The Magistrate Judge's Report and Recommendation (Pet. App. 21a) is unreported. The District Court's Final Order (Pet. App. 42a) is unreported. The order of the Eighth Circuit denying the petition for rehearing and for rehearing en banc (Pet. App. 56a) is unreported. The order of the Eighth Circuit denying the motion to recall the mandate and stay the mandate pending filing of a petition for writ of certiorari (Pet. App. 57a) is unreported. The subsequent decision of the Eighth Circuit recalling the mandate on November 10, 2003 (J.A. 51) is also unreported.[1]

JURISDICTION

The judgment of the Eighth Circuit was entered on May 27, 2003. A timely petition for rehearing and for rehearing en banc was denied on August 6, 2003. A petition for writ of certiorari was granted on February 23, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portion of the removal statute, 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed") provides:

> **(2) Other aliens**
>
> Subject to paragraph (3)—
>
> **(A) Selection of country by alien**
>
> Except as otherwise provided in this paragraph—
>
> **(i)** any alien not described in paragraph (1)

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[1] The district court and the Eighth Circuit also issued unreported opinions on the question of whether petitioner would be released from custody pending the outcome of this appeal. The Eighth Circuit denied release.

who has been ordered removed may designate one country to which the alien wants to be removed, and

(ii) the Attorney General shall remove the alien to the country the alien so designates.

(B) Limitation on designation

An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

(C) Disregarding designation

The Attorney General may disregard a designation under subparagraph (A)(i) if—

(i) the alien fails to designate a country promptly;

(ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;

(iii) the government of the country is not willing to accept the alien into that country; or

(iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

(D) Alternative country

If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—

(i) does not inform the Attorney General or

the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

STATEMENT OF THE CASE

1. Somalia has been without a central government since the ouster of dictator Said Barre in 1991. *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash.), *aff'd*, 346 F.3d 873 (9th Cir. 2003). Over the last decade, warring factions have controlled portions of the country and a state of chaos persists. *See id.* The United States has no diplomatic relations with Somalia, maintains no embassy in Somalia, and has no consular relations with a government in Somalia. Ex. Vol. 203 & 216.[2] "Petitioner is a native and citizen of Somalia" who is subject to a final order of removal (i.e., deportation) from the United States. Br. in Opp'n 3; *see* 8th Cir. J.A. 37 n.16. Because Somalia is without a functioning government, the Attorney General concedes that it cannot get acceptance from Somalia for petitioner's return. *See* Br. in Opp'n (i); 8th Cir. J.A. 37; *see also* Pet. App. 6a.[3] The Attorney General cannot even obtain international travel documents, such as a

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[2] In its appeal to the Eighth Circuit, respondent submitted a Joint Appendix ("8th Cir. J.A.") (docketed July 12, 2002) and its district court exhibits ("Ex. Vol.") (docketed July 12, 2002).

[3] Acceptance of repatriation from foreign governments often occurs pursuant to the terms of an established mutual agreement between the receiving country and the United States. *See, e.g., United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959); *Ellis v. Ferro*, 549 F. Supp. 428, 433 (W.D.N.Y. 1982); *see also* Reciprocal Arrangement between United States and Canada for the Exchange of Deportees, OI 243.1(c)(2)(IIII) (Appx.), *available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44969/slb-51000?f=templates&fn=document-frame.htm#slb-aoi2431c2.

Acceptance also commonly comes in response to an inquiry to the receiving country, for example in the form of a letter from the Consul General of the designated country. *See, e.g., Chi Sheng Liu v. Holton*, 297 F.2d 740, 744 (9th Cir. 1961); *Necessity that Country Accept Deported Alien*, 2 Immigration Law Serv. § 17:427. The grant of acceptance additionally may be evidenced by the issuance of travel documents by the receiving country to the deportee. *See United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468 (S.D.N.Y. 1956); *Feng Yeat Chow v. Shaughnessy*, 151 F. Supp. 23, 26 (S.D.N.Y. 1957).

passport, which could be used for petitioner's passage outside the United States and entry to the removal country. *See* 8th Cir. J.A. 17; J.A. 37, 41.

Before the district court intervened, INS agents planned to remove petitioner to Somalia without any acceptance by a government. This planned removal involved placing petitioner on a commercial flight into Somalia from Dubai, in the United Arab Emirates. The INS agents would not have accompanied petitioner on the flight into Somalia, presumably because of the lack of a recognized government and because travel there is too dangerous. *See* J.A. 37, 44, 47.[4] During the time in question, news services were reporting people being killed "at the very airport where the INS seeks to drop [him]." Pet. App. 26a (quotation omitted). If and when he landed in Somalia, petitioner would have had no Somali travel or identity documents, and he would have arrived as a United States deportee into the war-torn country from which he fled as a child refugee over a decade ago.

Since 1991, the INS and its successor, the Bureau of Citizenship and Immigration Services ("BCIS"), part of the Department of Homeland Security ("DHS"),[5] has concluded

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[4] *See* Travel Warning – Somalia, DOS, Bureau of Consular Affairs, Oct. 31, 2003, *available at* http://travel.state.gov/somalia_warning.html.

[5] On March 1, 2003, functions of several border and security agencies, including certain functions formerly performed within the Department of Justice by the Immigration and Naturalization Service ("INS"), were transferred to the Department of Homeland Security ("DHS"). *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 441(2) & 451(b), codified at 6 U.S.C. §§ 251(2) & 271(b)). The reorganization consolidated the immigration-related functions into two bureaus: the BCIS, which is responsible for immigration benefits services, and the Bureau of Immigration and Customs Enforcement ("BICE"), of which the Office of Detention and Removal is a division. The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. *See Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9,830-9,846 (Mar. 5, 2003), codified at

that the ongoing armed conflict in Somalia poses a serious threat to the personal safety of returning Somalis. *See DHS Extension of the Designation of Somalia under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-43,150 (July 21, 2003). The DHS acknowledges that "an atmosphere of lawlessness" exists in Somalia. *Id.* at 43,148. "Major regions of the country are under the control of bandits and the population is beyond the reach of the rule of law." *Id.*[6] The DHS found that lacking a functioning government, Somalis within the country rely on family connections and collective security for survival and, as a result, "[n]ew arrivals, outside this network, would be extremely vulnerable." *Id.* These grim facts led the DHS to the conclusion that requiring the return of Somali aliens "would pose a serious threat to their personal safety." *Id.*[7] In fact, after one removal of several Somalis from the United States to Mogadishu in early 2002, the BBC reported "[t]he body of a man who was deported with others from the USA was discovered on Saturday near Mogadishu's milk factory [and]

8 C.F.R. §§ 1001-1133 (Justice Department implementing regulations after enactment of the Homeland Security Act).

[6] The DHS reports that the ongoing conflict in Somalia has prevented much of the humanitarian relief from reaching some areas where the need is greatest. 68 Fed. Reg. at 43,148. "Some 500,000 people are currently threatened by severe food shortages. 72 percent of the population has no access to healthcare, and 77 percent lack access to clean, potable water." *Id.* An estimated 400,000 are displaced within the country itself, and Somalia's institutions are not able to adequately address the demands of a ravaged population. *Id.*

[7] The DHS made this finding in connection with its notice extending the designation of Somalia under the Temporary Protected Status program ("TPS"). Under the TPS program eligible Somali aliens in the United States can apply to receive TPS benefits, including temporary protection against removal from the United States and work authorization. 68 Fed. Reg. 43, 149. But petitioner is not eligible for the program because of his criminal conviction. *See* 8 U.S.C. § 1254(c)(2)(B).

[r]eports say that the man was kidnapped in Bulo Huubey District the previous evening." Somalia: Man Deported from U.S. Killed in Mogadishu, BBC WORLDWIDE MONITORING, May 14, 2002, *available at* LEXIS, MDEAFR Library, BBCMIR File; *see also* Janine Di Giovanni, *How American Dream Faded in Downtown Mogadishu*, TIMES LONDON, Feb. 26, 2002, *available at* 2002 WL 4184793.

2. The effort to remove petitioner must be viewed in historical context. Over the years, the INS has been unable to deport thousands of aliens to countries such as China, Vietnam, Cambodia, Laos, Cuba, Iran, Iraq, North Korea, Libya, and the former Soviet Union because acceptance could not be obtained. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650 n.10 (May 11, 1998).[8] Many aliens with final removal orders whom the INS at different periods has been unable to remove came from countries with which the United States did not have full or normal diplomatic relations (e.g., Cuba, Iran, Iraq, and North Korea). Like Somalia, those countries had no government that would accept their nationals whom the United States wished to deport. *Id.* at 651. Other long-term detainees are "stateless" persons, such as former Soviet citizens who do not meet the citizenship requirements of the now-independent former Soviet republics. *Id.*; *see also Zadvydas v. Davis*, 533 U.S. 678, 663 (2001). In addition, the INS traditionally has not deported removable aliens to countries with which the United States developed diplomatic ties but that nevertheless refused to accept the return of their nationals (e.g., Vietnam, Laos, Cambodia, and the People's Republic of China). Kerwin, *supra*, at 650 n.10; *see also Zadvydas,* 533 U.S. at 686

[8] The United States currently has diplomatic relations with the governments of a number of these countries and is now able to obtain acceptance for removals.

(noting that there was "no realistic chance" of removal to Cambodia, which had no repatriation treaty with the U.S.).

In the late 1990s after INS districts started removing small numbers of Somalis to Somalia despite the conditions in that country and this inability to gain acceptance. Mary Beth Sheridan, *For Somalis, a Home and Haven; Residents of U.S. Fight Deportation as Too Dangerous*, WASH. POST, Dec. 27, 2002, at A4, *available at* 2002 WL 104309228.[9] Thus, in the case of Somalia, the INS has abandoned its historical practice of gaining acceptance from the country of removal. Despite Somalia's current problems, however, it is only a matter of time before Somalia once again has a central government or governments of successor states emerge, which will be able to tender the requisite acceptance in compliance with the removal statute, 8 U.S.C. § 1231(b)(2).

3. Petitioner Keyse Jama is a Somali native and citizen born in that country in 1979. In 1991, at age 12, he and his family traveled to Kenya to escape inter-tribal warfare in Somalia. J.A. 10. While in a refugee camp in Kenya, petitioner and his family applied for admission to the United States. They were found to meet the definition of "refugees," *see* 8 U.S.C. § 1157 (having a well-founded fear of persecution on account of membership in a particular social group, i.e., clan), and resettled in the United States. Petitioner was inspected and admitted as a refugee at one of the New York City airports in February 1996. J.A. 30. He and his family later came to Minnesota and settled in the Twin Cities area, where petitioner worked and attended school. Pet. App. 43a.

Petitioner became removable from the United States pursuant to 8 U.S.C. § 1182(a)(2)(A)(i)(I) as a result of a conviction for third-degree assault. In June 1999 petitioner

[9] Respondent has no knowledge about the fate of any Somalis returned to Somalia.

observed through his apartment window a friend being attacked by members of another clan, and came to his friend's assistance. J.A. 14. In the ensuing fight, a number of people sustained injuries, including stab wounds. Petitioner's friend escaped but the police arrested the others, including petitioner. *Id.* Petitioner pled guilty in September 1999 to one count of third-degree assault—a felony under Minnesota law—and was sentenced to one year and one day in prison. The court stayed petitioner's sentence and placed him on probation. *Id.* The day petitioner was released, however, he was found intoxicated in violation of the conditions of his probation and was ordered to serve the remainder of his sentence in state prison. *Id.* at 15. After completing his sentence in June 2000, petitioner was transferred to the custody of the INS where he remains.

The INS initiated removal proceedings against petitioner in November 1999 as a result of his felony conviction. J.A. 5. At a June 5, 2000 immigration hearing, petitioner admitted that he is a native of Somalia and conceded removability based on his criminal conviction. *Id.* Petitioner declined to designate a country for removal, as was his right, and instead stated that he intended to apply for relief from removal based on fear of persecution and torture in Somalia. *Id.* The Immigration Judge then selected Somalia as the country of removal. *Id.* Petitioner filed an application for asylum dated July 5, 2000. Ex. Vol. 85-92. He also filed applications for permanent resident alien status and waiver, for withholding of removal under 8 U.S.C. § 1231(b)(3)(B)(ii), and for relief under Article 3 of the United Nations Convention Against Torture ("C.A.T."). J.A. 5-7.

In August 2000, the Immigration Judge conducted a hearing to consider petitioner's applications for relief from removal. Petitioner's criminal conviction made him ineligible for asylum and withholding of removal. Therefore, the Immigration Judge did not, and could not, review the

merits of these claims. J.A. 5-6, 20-23. The Immigration Judge also declined to adjust petitioner's status to permanent resident on the basis of petitioner's criminal record. *Id.* at 20. The Immigration Judge concluded that petitioner had not sustained his claim that he would be tortured upon his return to Somalia. *Id.* at 23-24. Petitioner appealed the decision denying his application under the C.A.T. to the Board of Immigration Appeals ("BIA").

The BIA affirmed the decision of the Immigration Judge denying petitioner's applications for C.A.T. relief as well as for asylum, withholding of removal, and adjustment of status. J.A. 26-27. The BIA's decision made petitioner's removal order final as of May 9, 2001.[10]

On May 25, 2001, the INS issued a Warrant of Removal and Warning to Alien Ordered Removed authorizing its agents "to take into custody and remove" petitioner from the United States "pursuant to the law." J.A. 30-34. The warning states that petitioner may be removed "[a]t any time." *Id.* at 34. Neither document identifies a country to which petitioner could be removed. Immigration officers, however, confirmed imminent plans to remove petitioner to Somalia. Accordingly, petitioner filed this petition for writ

[10] Petitioner contests the government's repeated assertions that the immigration proceedings, which reviewed on the merits only the narrow C.A.T. claim, definitively established that petitioner faces little or no risk of persecution or other abuse of his human rights were he returned to Somalia. *See, e.g.*, Brief in Op. at 14-15. To the contrary, the DHS's conclusion of unique danger to returning Somalis necessitating 13 years of temporary protected status for the entire country demonstrates high risk of persecution and violence awaiting petitioner should he return under present conditions. Although not relevant to petitioner's exhausted asylum and C.A.T. claims, this information regarding the lack of government and dangerous conditions in Somalia, and the threat removal there poses to petitioner, emphasizes the importance of the congressionally mandated acceptance requirement. *See* Pet. App. at 26a; *see also Ali*, 213 F.R.D. at 400.

of habeas corpus pro se on June, 28, 2001 pursuant to 28 U.S.C. 2241. Pet. App. 13a.[11]

4. Petitioner's petition for writ of habeas corpus sought to prevent his removal to Somalia until a government in Somalia had agreed to accept his repatriation. The petition did not challenge the validity of the removal order or even petitioner's eventual removal to Somalia. Rather, petitioner argued that under 8 U.S.C. § 1231(b)(2) the INS could not remove him to Somalia without first establishing that a government in Somalia would accept him. Pet. App. 13a.

Before reaching the merits of petitioner's claim, the United States District Court for the District of Minnesota (Tunheim, J.) rejected respondent's assertion that it lacked habeas jurisdiction to review petitioner's claim. Pet. App. 45a. The court found that the habeas petition raised a "pure question of law" and reviewed only the question of whether the INS's planned imminent removal to Somalia violated the authorizing statute. *Id.* at 48a.

The parties and the court agreed that 8 U.S.C. § 1231(b)(2) sets forth a three-step process for selecting the countries to which the Attorney General may remove an alien. In "step one," § 1231(b)(2)(A)-(C), the alien may or may not designate a country. If the alien does not designate a country or that country does not grant timely acceptance, the Attorney General moves to "step-two," § 1231(b)(2)(D), which requires removal to the country of which the alien is a "subject, national, or citizen," unless that country does not grant timely acceptance. When no acceptance is forthcoming, § 1231(b)(2)(E) authorizes additional removal countries in "step-three."

[11] Petitioner's current pro bono counsel began representing petitioner shortly after he filed his pro se habeas petition. Petitioner had separate counsel during the immigration proceedings.

Respondent conceded that Somalia has been without a functioning central government since 1991. *See* Br. in Opp'n (i); 8th Cir. J.A. 13. Nevertheless, Respondent claimed that under § 1231(b)(2)(D) (mandating removal to the country of which an alien is a "subject, national, or citizen"), the acceptance requirement under that clause is irrelevant because Somalia has no government. 8th Cir. J.A. 37 n. 16; *see* Pet. App. 34a n.7. Respondent also asserted that § 1231(b)(2)(E)(i)-(vi) does not require acceptance before sending petitioner back to Somalia, where he was born. *See* Br. in Opp'n 9; Resp't Appeal Br. to 8th Cir. 42; *see also* Pet. App. 48a.[12]

The district court, adopting the Report and Recommendation of the Magistrate Judge, Pet. App. 21a, granted habeas relief in favor of petitioner. It found that respondent's interpretation of step three, § 1231(b)(2)(E), would have rendered step two, § 1231(b)(2)(D), which explicitly requires acceptance by a country of which the alien is a "subject, national, or citizen," meaningless. Pet. App. 51a. Therefore, the court adopted a unified construction of the statutory provision, giving effect to all of its clauses, and held that the acceptance requirement applied to all of the sub-clauses listed in step three of the removal statute. *Id.*

Respondent appealed. A panel of the Eighth Circuit unanimously held that habeas jurisdiction obtained and that the petition was properly before the court. Pet. App. 1a-4a. In so holding, the court of appeals rejected respondent's argument, based upon principles of default and waiver, that petitioner should have challenged the INS's decision to

[12] Respondent has taken the alternative positions below that the INS received acceptance by virtue of being able to physically accomplish removal, arguing that statutory "acceptance" occurs when the flight crew of a plane from Dubai to a city in Somalia accepts the deportee, J.A. 47, or when the deportee is allowed to deplane in Somalia and is not returned to the United States. *See* Resp't Appeal Br. to 8th Cir. 45; *see also* Pet. App. 34a.

remove him to Somalia in the immigration proceedings below. *Id.* at 2a-3a. The court acknowledged that petitioner was not seeking to challenge the final removal order itself, or the constitutionality of the INA. And the court declined to apply the INA's limits on judicial review of the Attorney General's discretionary decision to petitioner's purely legal claims. Pet. App. 3a (holding that petitioner sought review of "a purely legal question of statutory construction"). In reaching this conclusion, the court relied upon "the principles set forth in *INS v. St. Cyr*, *Calcano-Martinez v. INS*, and *Demore*." Pet. App. 3a (citations omitted).

The panel split, however, on the merits of petitioner's claim and the majority reversed the district court's holding regarding the acceptance requirement. Pet. App. 1a. The majority reasoned that, because Congress inserted an acceptance requirement into steps one and two of the removal statute, the absence of an explicit acceptance requirement in all the individual subparts but the final one of step three indicated that the statute does not require acceptance by the removal country. *Id.* at 6a. In so holding, the majority rejected previous decisions of various Courts of Appeals: "We are not bound by these decisions; indeed, we are not persuaded by them * * * ." *Id.*

The majority recognized that its interpretation would lead to the anomalous result in which a country could refuse to accept one of its subjects, nationals, or citizens for removal under step two and the Attorney General could then forcibly remove the alien to that same country as an "additional country" under step three. The majority rationalized this result by stating that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." *Id.* at 7a.

Judge Bye dissented. The dissent would have followed the "well-settled" interpretation of the statutory provision at

issue, most prominently articulated by Judge Learned Hand in *Tom Man*, 264 F.2d 926, that there were "no circumstances under which the statue allowed the United States to deport an alien unless the receiving country was 'willing to accept' him." Pet. App. at 9a. The dissent first explained that there was an established and consistent body of case law interpreting the removal statute to require acceptance. It also noted that Congress had often amended or reenacted the statute, without substantive change, aware of this settled construction. The dissent refused to read into the statute a statelessness exception, stating that "we require a functioning central government as an 'essential aspect' of a 'country' to which an alien can be deported." *Id.* at 11a-12a. The very definition of "country," wrote the dissent, requires a functioning government. *Id.* at 12a.

5. Respondent argued below that it is important to interpret the removal statute in issue to permit removal to Somalia without acceptance by a government in order to assist the DHS in the fight against terrorism. However, the Attorney General merely attempts a routine administrative removal of petitioner.[13] As a matter of general policy, entirely separate immigration statutory provisions deal with the subject of "alien terrorists." *See* 8 U.S.C. § 1537 *et seq.* Specifically, § 1537(b)(2) (reproduced at Appendix C, 7a), sets forth a streamlined procedure for removal of an "alien terrorist." If an appropriate country is not determined by the alien's designation at § 1537(b)(2)(A), then the statute immediately authorizes the Attorney General to remove an alien "to any country willing to receive such alien." § 1537(b)(2)(B).

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[13] The district court has noted in this case that the government's "too-frequent references to terrorism [do not lead to the administration of justice] and are not useful to the resolution of this matter." Dist. Ct. Order, Jan. 12, 2004 (01-1172, dkt # 83) 6 n. 8.

SUMMARY OF ARGUMENT

The government seeks to remove (i.e., deport) petitioner, who is a native and citizen of Somalia, to Somalia despite the lack of a functioning government which could accept petitioner. In 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed"), Congress authorized the Attorney General to remove a deportable alien pursuant to a specific country selection process, upon which Congress placed specific limitations. If the alien fails to designate a country of removal, the Attorney General shall remove the alien to "a country of which the alien is a subject, national, or citizen" as long as that country is willing to accept the alien. § 1231(b)(2)(D). Somalia is currently a war-torn society with no central government. As a result, it is undisputed that acceptance cannot be obtained from a government in Somalia for petitioner's removal to that country. Since the requirement of § 1231(b)(2)(C) that a government in Somalia accept petitioner cannot be met, removal to Somalia cannot take place until there is a government willing to accept petitioner into Somalia.

The Attorney General claims that it can ignore the statutory requirements of § 1231(b)(2)(C) and remove petitioner to Somalia, despite the lack of a functioning government willing to accept petitioner, under the last step of the removal process, § 1231 (b)(2)(E), because Somalia is the country where petitioner was born. § 1231(b)(2)(E)(iv). However, the proper interpretation of § 1231(b)(2)(E) is that there must be a government willing to accept the removable alien in any of the "additional removal countries" in § 1231(b)(2)(E), including the country where the alien was born. The plain language of the statute establishes that each of the countries listed as additional removal countries in step three, § 1231(b)(2)(E), must have a government willing to accept the alien. Respondent's statutory interpretation would render the acceptance requirement in step two — where acceptance is required from the country of which the alien is

a subject, national or citizen — superfluous because the Attorney General could eliminate the need for acceptance by choosing the same country as an additional removal country in step three. Moreover, "country" as used in the statute means a state with a central government and Somalia has none.

The requirement that there be a government in the country of removal which is willing to accept the alien has been part of the statute authorizing removal since the progressive, three-step removal process was authorized by Congress in 1952 and part of the law of deportation for far longer. There has been a consistent body of statutory interpretation by the federal courts construing the statute to require acceptance from the governments of the various countries listed in the statute as alternative step-three countries of removal. Historically, the government has not deported thousands of removable aliens, because, as here, the Attorney General could not obtain the acceptance of a receiving government. Despite this, Congress has made numerous amendments and in 1996 recodified the paragraph at issue without substantive change to the statutory language requiring acceptance.

The decision of the divided Eighth Circuit panel below broke with the history of statutory interpretation. The Eighth Circuit, creating a split in the circuits, held that an alien could be removed to the country of birth although no government accepted the alien, even if that country was the same country of which the alien was a subject, national or citizen. The decision of the Eighth Circuit should be reversed.

ARGUMENT

THE REMOVAL STATUTE REQUIRES ACCEPTANCE FROM THE RECEIVING COUNTRY

I. The Statute Does Not Grant The Executive Discretion To Remove Petitioner To Somalia Without Acceptance.

Section 1231(b)(2) serves three purposes: it cabins the discretion of the Executive Branch; it provides an orderly, progressive process for the selection of a receiving country; and it ensures a safe transfer of the alien to the government of the receiving country.

Congress maintains plenary power over the admission and removal of aliens and over the role of the Executive Branch in removing aliens from the United States, particularly its interaction with other governments or countries. U.S. Const. Art. I, § 8, cl. 4; *INS v. Chadha*, 462 U.S. 919, 940 (1983). Where Congress has plenary power, the Executive Branch may carry out its duties only to the extent of its Congressional grant of authority. *See Zadvydas*, 533 U.S. at 695; *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). As Congress has enacted an authorizing statute, the Executive Branch does not have unfettered discretion to determine where to remove a deportable alien. To the contrary, this grant of power may only be exercised within the limits imposed by Congress:

> [N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress. And in our anxiety to effectuate the congressional purpose of protecting the public, we

> must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.

Food & Drug Admin., 529 U.S. at 161 (citations and quotations omitted).

In 8 U.S.C. § 1231(b)(2) ("Countries to which aliens may be removed") Congress authorized the Attorney General to remove deportable aliens pursuant to a explicit country selection process, upon which Congress placed specific limitations. The Attorney General must follow a progressive three-step process in finding a country to which the alien can be removed, with priority placed upon the country with the most significant connection to the alien.

The three-step process mandated by the statute begins by allowing the alien to designate a country to which he or she may be sent. § 1231(b)(2)(A). If the alien fails to designate a country, or if the designated country does not give its acceptance, the Attorney General must move to the second step. § 1231(b)(2)(C). That step requires the Attorney General to remove the alien to "a country of which the alien is a subject, national, or citizen" as long as that country is willing to accept the alien. § 1231(b)(2)(D). If no country satisfies the requirements of step two, the Attorney General must move to step three, which allows removal to a country with a more attenuated connection to the alien, again as long as the country is willing to accept the alien. § 1231(b)(2)(E).

The outer limit of the Attorney General's authority, then, which circumscribes the selection of any country, is that the government of the country of removal must be willing to accept the alien. The fact of this minimum standard is evidenced by the precise language of the last sentence of the statutory three-step process, which limits the final possible removal country to "*another* country whose government will accept the alien into that country." § 1231(b)(2)(E)(vii) (emphasis added).

"A deportation policy can be successful only to the extent that some other state is willing to accept those we expel." *See United States v. Spector*, 343 U.S. 169, 179-80 (1952) (Jackson J., dissenting). It is clear that Congress directed the Attorney General to obtain acceptance from the receiving country in § 1231(b)(2)(D) ("the Attorney General *shall* remove the alien to a country of which the alien is a subject, national, or citizen *unless* the government of the country— * * * is not willing to accept the alien into the country" (emphasis added)). Congress presumably enacted this requirement to further the interests of the United States. The acceptance requirement is necessary to ensure an orderly, safe transfer of the alien to the receiving country. Thus, it fosters the interest of the United States in both respect for sovereignty of nations and the orderly transfer of persons between governments. When the removal country has a government recognized by the United States, the acceptance requirement affirms a respect for sovereignty that is in the interest of the United States. When there is no recognized government or, as here, no central government at all, maintaining the acceptance requirement may create the inconvenience of waiting for a government to form that can accept repatriation. However, removal can then take place to a government which is accountable for its citizens. To simply remove the alien to a region in a state of continual territorial war and lacking even a government cuts against the interest of the United States in stable and orderly repatriation.[14] The progressive three-step process, including

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[14] The government's scheme to remove petitioner to Somalia with no acceptance by a government and with the expectation that he will arrive into a state of lawlessness in personal danger also emphasizes the importance of the congressionally mandated requirement that a government agree to accept his return. Although not all governments successfully safeguard the human rights of their citizens, a deportee from the United States at least joins the citizenry of a country whose government the international community can hold accountable for abuses and pressure for reform.

its outer limit of the requirement of acceptance from a government willing to receive the alien, has been a part of the removal statute since 1952 and has survived numerous amendments and a recodification intact.

Petitioner's proposed deportation to Somalia violates that consistent statutory process. Petitioner did not designate a country of removal. Respondent concedes that petitioner, a native of Somalia, is a "national and citizen of Somalia." *See* Br. in Opp'n 3; 8th Cir. J.A. 37. Thus, the statute requires the Attorney General to attempt to remove petitioner under step two. The Attorney General admits that the acceptance requirement of § 1231(b)(2)(D) cannot be met at this time because Somalia has no government to accept petitioner. In petitioner's case, this fact should have ended the Attorney General's efforts to remove him to Somalia until the Attorney General could get acceptance from a recognized government there. Unless the Attorney General could remove petitioner to one of the other "additional removal countries" identified in step three, petitioner's situation would be the same as thousands of deportable aliens over the last half century who also could not be removed from the United States until there was a legitimate, recognized government from which acceptance could be obtained. *See* Donald M. Kerwin, *Throwing Away the Key: Lifers in INS Custody*, 75 No. 18 Interpreter Releases 649, 650-52 (May 11, 1998). The statutory language in step two, §1231(b)(2)(D), contains no exception excusing the Attorney General from the acceptance requirement if no functioning or recognized government exists.

The additional country options offered in step three do not assist the Attorney General in petitioner's case. Under the final step of the process, if the alien cannot be removed to a country of which the alien is a subject, national, or citizen because the requisite acceptance cannot be obtained, then the statute sets forth "Additional removal countries" to which the alien might be removed:

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii)A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv)The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi)The country in which the alien's birthplace is located when the alien is ordered removed.

(vii)If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2)(E).

The first six subparts of step three describe various countries, each of which has a logical connection to the alien—although not as close a connection as the country of which the alien is a subject, national, or citizen. There is no order of priority within this group of six country options. The last subpart (vii) of this step three sets the outer limit of

possible removal countries which is another country found by the Attorney General whose government is willing to accept the alien.

After escaping to Kenya in 1991, petitioner's family left Kenya and came to the United States as refugees in 1996. But the United States does not remove people back to countries which allowed creation of refugee camps on their territory without express acceptance because these countries otherwise would not allow the camps to exist if repatriation of a third country's refugees were foisted upon them later. Subparts (i)-(ii) then do not offer an additional removal option. Options (iii)-(vi) necessarily refer to Somalia, the same country to which the Attorney General could not remove petitioner under step two because of lack of a government able to consent to receive him. The logical progression of the statute prohibits the Attorney General from accomplishing under step three what could not be done under step two. The Attorney General has not found a second country that might be willing to accept petitioner under subpart (vii). Thus, the removal possibilities end at step two with Somalia until a government there is able to accept petitioner's return.

II. Respondent's Position Violates Basic Canons Of Statutory Interpretation.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention." *United States v. Am. Trucking Ass'ns,* 310 U.S. 534, 542 (1940). Where the words of the statute are sufficient to determine the purpose of the legislation, the Court need not look beyond their plain meaning. *Id.* at 543. In the present matter, the plain meaning of the words of the statute establishes that acceptance is required from any of the removal countries designated in the statute.

Words must also be read in their context within the statute, however. *Id.* at 542. The statute should be read as a whole to give every provision meaning. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 113 (2001). Of course, when the plain meaning of a statute leads to absurd or futile results, the Court may look beyond the words to the statutory purpose. *Am. Trucking*, 310 U.S. at 543. And "even when the plain meaning [does] not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' [the] Court has followed that purpose rather than the literal words." *Id.* Here, the plain meaning of the words of the statute establish that acceptance is required from any country designated for removal.

Respondent has offered two interpretations of the statute: the first asserts that because Somalia has no government, the acceptance requirement is not relevant and, second, that despite respondent's inability to obtain acceptance under step two, it may remove petitioner to the same country under step three without acceptance. Neither interpretation is supported by the text of the statute and both violate a number of cannons of statutory interpretation.

A. The Plain Language Of The Statute Requires Acceptance At Every Step.

Respondent's first argument, that the acceptance requirement is irrelevant because Somalia has no government, contradicts the plain meaning of the text. Section (b)(2)(C) allows only one construction. It requires that the Attorney General get the timely acceptance of the country of which the alien is a citizen, subject or nation. The statute does not contain an exception if there is no government to ask. In fact, the Attorney General over the years has been unable to remove a large number of people because, in the eyes our government, the removal country lacked a government from which acceptance could be

obtained. *See* Kerwin, *supra*, at 650 n. 10. Had Congress wished to create such an exception, it would have written it into the text of the statute.

Moreover, if it had been Congress' intent to grant the Executive power to remove aliens to geographical places where there was no functioning government to accept and receive an alien simply because the Executive could accomplish the removal to that place, then it made little sense to impose the requirement that there be a "government" willing to accept the alien in the last subpart of step three, which deals with the outer limit of the Executive's authority. If that had been Congress' intent, the statute would have read, in subpart (vii), that the Executive could remove the alien to any other place where it could accomplish removal.

Similarly, the text of the statute cannot support the reading that acceptance is not required in six of the seven subparts that make up step three. The acceptance requirement in subpart (vii), authorizing removal to yet another country which will accept the alien, articulates a requirement for all seven subparts. The text contains three different indications that the acceptance requirement applies to all seven subparts.

First, subpart (vii) of § 1231(b)(2)(E) requires "*another* country whose government will accept the alien into that country." The use of "another" instead of the indefinite "a" or "any" indicates that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts. As a matter of statutory construction, a plain reading of this last subpart of § 1231(b)(2)(E) is thus that it modifies the previous six subparts. *United States ex rel. Tom Man v. Murff*, 264 F.2d 926, 928 (2d Cir. 1959).

Second, only an artificially fragmented reading of § 1231(b)(2)(E) avoids this acceptance requirement. § 1231(b)(2)(E) should be viewed as a whole, not only as a matter of general statutory construction but also because of

the history of this particular provision. The precursor text, § 243(a) of the INA, enacted in 1952 and essentially unchanged to the present, is one paragraph. *See* 1952 text, *reproduced at* Appendix A, 1a. Subsequent revisions left the language largely unaltered but, as with many of the older statutes, inserted additional headings. Subparagraph § 1231(b)(2)(E) is not a stand-alone provision but an integrated component of the paragraph § 1231(b): "Countries to which aliens may be removed." The subparagraphs are interconnected, with the alternative steps related to and dependant on the previous step. Steps one, two and the last subpart of step three all require the acceptance of the receiving government and only the most mechanical reading denies the requirement with respect to subparts (i)-(vi) of step three. The acceptance requirement permeates the provision.

Finally, an examination of the consequences of respondent's alternative reading makes clear that the acceptance requirement is present throughout § 1231(b)(2)(E), the step-three provision. Respondent argues that subparts (i)-(vi) do not require the consent of the receiving government, and invokes subpart (iv) denoting the country in which an alien was born. In addition to the problem that, in petitioner's situation, respondent's construction disables step two entirely, this interpretation also leads to unmanageable results when applied to the other subparts. These results could not have been the intention of Congress. For example, the first subpart, which authorizes the removal to the country from which the alien was admitted to the United States, will very often involve removals to Mexico, Canada or, because flights from northeast Africa go through western Europe, a European country. Yet Congress could not have intended to give the Attorney General discretion to remove an alien to any one of these countries, whose close relationship with the United States necessarily requires "respect for sovereignty," without that country's

acceptance. Thus, the Attorney General's construction of the statute necessarily involves reading into the statute an exception for failed states or countries which are too underdeveloped to resist. Had Congress intended to make the country designation and removal process purely a matter of executive discretion, the much simpler and logical method instead of requiring acceptance would have been to authorize the Attorney General to remove an alien to any place it believed was practical, advisable or possible, thus giving the Attorney General the discretion to decide if acceptance was necessary or not. The statute did not contain that grant of discretion and the Attorney General should not be allowed to read one in.

Respondent's interpretation also would allow the Attorney General to ignore the undeniably progressive nature of the provision. Again, the text simply does not allow this revision. The Attorney General wants to skip a step, or to do under step three exactly what it could not do under step two. Respondent's interpretation of the statute would twist the removal process so that: (a) acceptance *would* be required from the country that has the closest connection with the alien, that country of which he is a subject, national, or citizen, § 1231(b)(2)(D); (b) acceptance *would not* be required from those countries that have some connection to the alien, although less than the country of nationality or citizenship, when the Attorney General moved to one of the six additional countries in step three, § 1231(b)(2)(E)(i)-(vi); and (c) acceptance *reemerges* as a requirement as to the country of last resort in (vii) which, of course, would have the most attenuated connection to the alien. This reading illogically eviscerates the progressive structure of the statute.

The proper interpretation of the statute, which harmonizes the provision as a whole, is a plain reading which recognizes specific reference to "another country whose government will accept the alien into that country" in (vii) of step three as an integral and necessary part of the entire

subparagraph §1231(b)(2)(E). Thus, in order for the Attorney General to remove to one of the six countries listed in the first six subparts of § 1231(b)(2)(E), there must be a government willing to accept the alien into that country.

B. Respondent's Interpretation Would Create Inconsistency In The Statute And Render Part Of The Statute Superfluous.

Respondent argued, and the Eighth Circuit panel majority agreed, that petitioner could be removed to Somalia, the country of petitioner's citizenship and nationality, despite the lack of acceptance under step two because Somalia also happens to be the country of birth under step three. This proposed interpretation of the removal statute, by which the Attorney General can avoid the explicit acceptance requirement of step two by removing the alien to the same country without acceptance in step three, was never adopted by any court prior to the Eighth Circuit's decision. It would make the second step of the statute, which requires acceptance by the government of which the alien is a subject, national, or citizen, superfluous and thus would violate a basic principle of statutory construction. *See Circuit City*, 532 U.S. at 113. As the district court observed, "a removable alien will almost invariably be a 'subject, national, or citizen' of the country in which he was born. As a result, the acceptance requirement of § 1231(b)(2)(D) is easily circumvented by § 1231(b)(2)(E)(iv) if the latter clause is read not to require acceptance." Pet. App. at 50a-51a.

Respondent's reading of § 1231(b)(2)(E) would also allow outright defiance of a country's explicit refusal to accept an alien. Section 1231(b)(2) draws no distinction between a country's failure to inform the Attorney General of its acceptance and a country's explicit refusal of its acceptance. Although in this case the government must invoke step three because of a failure to inform, step three is also applicable if the countries in step one and two explicitly

refuse to accept the alien. Yet respondent's interpretation of step three—as not requiring acceptance—would allow it to invoke step three and dump an alien in a country that had already explicitly refused to accept that alien. The Ninth Circuit relied in part on this argument in ruling that the acceptance requirement also applies in step three. It noted that if respondent's interpretation were upheld, then even though a government has actually refused acceptance of a removable person in step two, the person could be "airdropped surreptitiously into that same country if it met the requirements of one of the subparts [of step three]." *Ali*, 346 F.3d at 881. The Ninth Circuit thus concluded that the INS should not be allowed to "thwart [the acceptance requirement] by skipping to Step 3." *Id.*

The Eighth Circuit dismissed this argument by saying that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act anyway if the request is refused." Pet. App. 7a. Such a response denigrates the sovereignty of other nations and undermines the congressional determination that the Executive Branch should treat other nations respectfully. And the concern that the United States might ignore an explicit refusal is not misplaced. In *Abdulrahman v. Heston*, No. H-02-0743, slip op. (S.D. Tex. June 9, 2003), a district court quoted the Eighth Circuit's language in authorizing the Attorney General to remove a person to Ethiopia over that country's express refusal of acceptance. *Id.* at 5.

The Eighth Circuit's ruling also creates inconsistencies within the statute. As noted earlier, it makes the acceptance requirement necessary for the countries with the most significant and insignificant connection with the alien, but not for those in between. It also directly contradicts the intent of subparagraphs (b)(2)(D) and (b)(2)(E). If the Eighth Circuit majority's statement were consistent with Congress' intent in enacting the statute, then step three should explicitly include the "country of which the alien is a subject, national,

or citizen," as set forth in step two. Then, respondent could request acceptance in step two and, if acceptance were not granted, respondent could nevertheless remove the alien to that same country in step three. The only explanation for the fact that the "country of which the alien is a subject, national, or citizen" is *not* included as one of the countries in step three is that step three is intended to "widen the net" for additional countries *that might conceivably accept the alien.* Conversely, under respondent's interpretation of the statute, if the alien is *not* a subject, national or citizen of the country in which he was born, then Congress strangely decided that an alien can be removed without acceptance to the country in which he was born, but *cannot* be removed without acceptance to the country of which he is a subject, national, or citizen. There is no reason for Congress to have excluded this option if it intended to permit respondent to remove the alien without acceptance. Respondent's interpretation therefore is unreasonable and "plainly at variance with the policy of the legislation as a whole." *Am. Trucking*, 310 U.S. at 543.

Respondent attempts to explain why the acceptance requirement would appear in step two but not in connection with the additional removal countries in step three by saying that the acceptance requirement is designed to show respect for the sovereignty of the country of which the alien is a subject, national, or citizen. Resp't Appeal Br. at 44. It makes no sense to interpret the statute, as the government would, as requiring this show of respect to the country of nationality or citizenship but not to a country further removed from the alien. Indeed, when the country is further removed from the alien, and less likely to be responsible for the alien, the need for acceptance is even greater, both in terms of respect for sovereign sensitivities and of course for the orderly transfer of the alien to a country able to receive him.

The removal statute's revised headings buoy petitioner's construction. Specifically, the 1996 amendment and recodification of what is now § 1231(b)(2)(E) changed the headings of that provision from "other countries" to "additional removal countries." Of course, headings are not conclusive of an issue of statutory interpretation. *See Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). But they can help the Court resolve ambiguity. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) (resolving "any possible ambiguity" by looking to statute's title). Here, inserting the word "additional" demonstrated Congress' intent that the statute be interpreted precisely as it always had been, most prominently in *Tom Man*. And substantively, the word "additional" suggests that the country in subpart (vii) must be different from any other country previously considered.

Other paragraphs of § 1231 would have little meaning if there were no acceptance requirement. For example, § 1231(a)(7) provides:

> [N]o alien ordered removed shall be eligible to receive authorization to be employed in the United States unless the Attorney General makes a specific finding that * * * the alien cannot be removed due to the refusal of all countries designated by the alien or under this section to receive the alien.

If a receiving country's refusal to accept a deportee could so easily be overridden, this provision, too, effectively would be useless.

The importance of obtaining acceptance from the government of the receiving country is demonstrated by the fact that even the INA's provision for removal of alien terrorists includes that requirement as its outer limit on the executive's authority. INA § 507(b), 8 U.S.C. § 1537(b)(2) (reproduced at Appendix C, 8a). If an appropriate country is not determined by the alien's designation at § 1537(b)(2)(A),

then the statute authorizes the Attorney General to remove the alien immediately "to any country willing to receive such alien." § 1537(b)(2)(B). These two provision of the same Act, §§ 1231(b)(2) and 1537(b)(2), dealing with the same subject matter and setting forth the same procedures, must be construed *in pari materia*. *See, e.g., Haig v. Agee*, 453 U.S. 280, 300-01 (1981) (interpreting Immigration and Nationality Act and Passport Act *in pari materia*).

C. "Country" Means A State With A Central Government.

Whenever the removal statute refers to a "country," it means a country with a central government capable of accepting the alien. Courts have consistently required a functioning central government as an "essential aspect" of a "country" to which an alien can be deported. *In re Linnas*, 19 I.&N. Dec. 302, 307 (BIA Oct. 16, 1985); *see also Ademi v. INS*, 31 F.3d 517, 521 (7th Cir. 1994) (recognizing impossibility of seeking acceptance from a country which has ceased to exist); *Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) ("[A]ny place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' * * * to which a deportable alien may be sent"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting a "country" with the meaning of the statute requires a functioning government with undisputed control over a well-defined geographical area).

The fact that "country" in the removal statute is intended to mean a country with a government is demonstrated by the language in step two that "[t]he Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen *unless the government of the country*" accepts the alien. In step three, in (vii), the statute, once again, when elaborating on "country" says "another *country*

whose government will accept" the alien. §1231(b)(2)(E)(vii).

The requirement that an accepting country have a functioning government defeats both of respondent's proposed interpretations of the statute. Respondent's first contention, that step two contains an exception for countries without a functioning government (such as Somalia), is patently inconsistent with the definition of "country" as a country with a central government.

Properly interpreting "country" in this way also defeats respondent's argument that step three does not require acceptance. The fact that the word "country" is not further elaborated upon in subparts (i) through (vi) to reference a government does not in any way suggest that in subparts (i) through (vi)—and in these subparts alone—"government" was excluded from the reference to "country." There was simply no need to elaborate upon country in subparts (i) through (vi) because the final subpart (vii), which is fully integrated into the subparagraph, contained the necessary reference to "government."

III. By Recodifying The Removal Statute Without Material Changes, Congress Adopted The Settled Construction Of The Acceptance Requirement.

"When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998). Courts and administrative agencies have interpreted the removal statute to require acceptance from the removal country for "nearly half a century." Pet. App. 9a (Bye, J., dissenting) (collecting cases). And Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990, and 1996 without making material changes to

the removal statute. Congress has thereby expressed its agreement and approval of the acceptance requirement at step three of the removal statute.

A. Prior Federal Cases Unanimously Impose An Acceptance Requirement.

As early as 1938, the Second Circuit affirmed a district court's conclusion that the country to which the United States deports an alien must accept the alien: "It will be presumed that in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien." *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023 (2d Cir. 1938). When *Hudak* was decided, § 20 of the Immigration Act of February 5, 1917 c.29, 39 Stat. 874, controlled where an alien could be removed. *See Saksagansky v. Weedin*, 53 F.2d 13, 16 (9th Cir. 1931) (quoting the relevant portion of statute and holding that removal can only be effected pursuant thereto).

In 1952, Congress passed the Immigration and Nationality Act, which set forth the three step progressive removal process that has governed ever since. 8 U.S.C. § 1253(a) (reproduced at Appendix A, 1a). In 1959, the Second Circuit in *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959) interpreted the statute to require acceptance before the Attorney General could remove an alien to the country where he was born under step three. In that case, the INS was attempting to deport an alien to China. At the time, the United States did not have diplomatic relations with the country known as "Mainland China" or "Communist China," but the INS contended that the alien could properly be sent there, even though there was no indication that he would be accepted when he arrived. The court in *Tom Man* considered whether the alien could be returned to Mainland China pursuant to 8 U.S.C. § 1253(a)(3), which was the statutory predecessor of

§ 1231(b)(2)(E)(iv). Section 1253(a)(3) allowed the INS to deport an alien "to the country in which he was born," if the country of which he was a "subject, national, or citizen" did not agree to accept him. Section 1253(a)(3) did not expressly include an acceptance requirement, just as the current § 1231(b)(2)(E)(iv) does not expressly include such a requirement. But § 1253(a)(7), the last subdivision of § 1253(a), did include an acceptance requirement, just as § 1231(b)(2)(E)(vii) does now.

In *Tom Man*, the court, in an opinion by Judge Learned Hand, concluded that deportation under *any* of the subdivisions of § 1253(a) "is subject to the condition expressed in the seventh subdivision; i.e. that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. Thus, the court held that the alien could not be deported to Mainland China, pursuant to § 1253(a)(3) or otherwise, unless there was a "mutual agreement between that 'country' and ourselves." *Id.*

> There remains therefore one or more of the seven subdivisions of §243(a) [previously codified at 8 U.S.C. §1253(a)] of which number three [the country in which he was born] certainly covers him and probably several others. *However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into its territory."*

Id. at 928 (emphasis added). In conclusion, the Second Circuit could not find "any reason to suppose that the necessary consent in such situations should not follow the pattern laid down earlier in the section." *Id.*

Judge Hand's view in *Tom Man* was not a lone voice. Indeed, every federal court that has considered the question until now has reached the same conclusion that acceptance is a fundamental condition of removal. *See Chi Sheng Liu v.*

Holton, 297 F.2d 740, 743 (9th Cir. 1961) (stating that former § 1253(a) "provides that an alien cannot be deported to any country unless its government is 'willing to accept him into its territory'"); *Rogers v. Lu*, 262 F.2d 471, 471 (D.C. Cir. 1958) (affirming without explanation judgment that the Attorney General may not deport the plaintiff to China "until and unless" the government indicates its willingness to accept the plaintiff). *Cf. Pelich v. INS*, 329 F.3d 1057, 1061 (9th Cir. 2003) (stating that an alien "can be deported to the country of his birth or to a country where he resided prior to entering the United States (assuming these countries would take him")) (citing § 1231(b)(2)(E)); *Amanullah v. Cobb*, 862 F.2d 362, 368 (1st Cir. 1988) (Coffin, J., concurring) ("agree[ing] that it is sheer folly to send an alien to another country without any indication that the country will receive the alien"); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 185 (D.C. Cir. 1963) ("'It must be remembered * * * that the deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil. It must be carried out through arrangements made with the foreign government.'") (quoting *Delany v. Moraitis*, 136 F.2d 129, 131 (4th Cir. 1943)).

Moreover, before the divided Eighth Circuit panel decision in this case, not one federal court had interpreted the removal statute to eliminate the acceptance requirement from the six countries in step three. *See* Pet. App. 38a ("the government has not cited a single case in which a federal court has sanctioned the removal of a legally admitted alien to a country that has not agreed to accept him").

B. Respondent's Own Interpretation Of The Statute Is At Odds With Its Current Litigation Position.

1. *Agency Case Holdings Unanimously Favor Acceptance Requirement.*

As with the pre-*Jama* consensus among all federal courts

considering the issue, agency decisions have recognized the removal statute's acceptance requirement. In *In re Linnas*, the Board of Immigration Appeals concurred with the holding in *Tom Man* and held that the removal statute's country designation process requires acceptance by the receiving government in all situations: "the 'government' * * * under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'" 19 I. & N. Dec. 302, 307 (BIA Oct. 16, 1985). In *In re Anùnciacion*, the Board similarly stated that "obviously, the United States cannot deport an alien to a country which will not accept her." Instead, the Board explicitly recognized that the designated country must accept the deportee under all three steps of the statute. 12 I. & N. Dec. 815, 818 (BIA 1968).

Respondent has attempted to overcome this settled construction of the removal statute by citing a solitary 1962 BIA decision, *In re Niesel*, 10 I. & N. Dec. 57, 59 (BIA 1962). But *Niesel* is inapposite. *Niesel* merely held that an immigration judge need not make a *preliminary* inquiry into acceptance at the time of the initial country designation. Thus, *Niesel* did not address the final acceptance requirement of the country to which the alien would be returned: "When designating a country in step three as a place of deportation, there is no requirement that *preliminary* inquiry be addressed to the country to which deportation is ordered." *Id.* at 59 (emphasis added).

2. Administrative Opinions Also Require Acceptance By The Receiving Country.

In February, 2003, while this case was pending before the Eighth Circuit, the Office of Legal Counsel ("OLC") provided an opinion (unrelated to this case) to the Deputy Attorney General of the United States that directly undermines respondent's litigation position. The OLC maintained that § 1231(b)(2)(E)(i)-(vi) require acceptance from any receiving country: "Each of those countries [in

subparts (i) through (vi)], of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time—presumably 30 days to decide whether to accept or reject the alien." Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service n. 11 and accompanying text, (February 20, 2003) *available at* http://www. usdoj.gov/olc/INSdetention.htm.

Furthermore, respondent's own operations instructions and regulations implicitly confirm the acceptance requirement: "deportation cannot be effected until travel documentation has been obtained." INS Operations Instruction 243.1, *available at* http://uscis.gov/lpBin/lpext.dll/inserts/slb/slb-1/slb-44969/slb-51000?f=templates&fn=document-frame.htm#slb-oi2431. If the country designated by the alien is unlikely to receive him, a simultaneous request for travel documents is to be made "to the authorities of the country to which he is likely to be deported." *Id.* And respondent admits that official travel documents cannot be obtained from Somalia. *See* Resp't Appeal Br. 10.

Finally, applicable federal regulations reinforce petitioner's interpretation. For example, 8 C.F.R. § 241.4(k)(1) provides for a "custody review * * * where the alien's removal, while proper, cannot be accomplished during the removal period because no country currently will accept the alien." *Ali*, 346 F.3d at 884. And 8 C.F.R. § 241.5(c)(1) authorizes issuance of employment authorization to an alien released from custody if the "[t]he alien cannot be removed because no country will accept the alien."

C. Congress Has Repeatedly Ratified Petitioner's Interpretation.

In light of this long-standing and consistent construction of the removal statute, if Congress had *not* intended that the

removal statute be read to include an acceptance requirement at each step, Congress could (and presumably would) have clarified the statute when Congress reenacted or made amendments to the Immigration and Naturalization Act in 1965, 1978, 1980, 1981, 1990, and 1996. To the contrary, Congress made no material changes and thus endorsed the settled judicial and administrative construction as correct.

As long ago as World War I there was an acceptance requirement for the removal of aliens. The Immigration Act of 1917 gave the government limited options in deporting an alien. The government could deport the alien to the country from which the alien: (1) came to the United States; (2) was a subject or citizen; or (3) was a resident prior to arriving in the United States. Immigration Act of 1917, Ch. 29, § 20, 39 Stat. 874. Acceptance from the country to which the alien was to be removed was required in all instances. *See United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023(2d Cir. 1938).

Following World War II, Congress considered significant changes to the immigration laws. In fact, Congress specifically debated the "undeportable" alien issue. This issue was of particular concern after World War II because the nascent Cold War was making it increasingly impossible to deport alien Communists. *See Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. at 4-5 (1949) ("many aliens, particularly alien Communists, ordered deported cannot be returned to the country of their nationality because of a passport refusal by their own government" Letter of Attorney General Tom C. Clark to Judiciary Committee); *see also Report of the Comm. of the Judiciary, pursuant to S. Res. 137*, as amended, 80th Cong., 1st Sess. at 637-38 (1950) ("[o]ne of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported") Congress

considered several options to address this problem including detention, orders of supervision, and "authorizing the Attorney General, within his discretion, to deport an alien to any country which would accept him into its territory." Senate Report at 638. Congress ultimately chose, in the Immigration and Nationality Act of 1952 ("INA"), to address the issue of "undeportables" by expanding the countries from which the Attorney General could seek to gain acceptance. But Congress did not eliminate the acceptance requirement. Section 243(a) of the INA set forth the modern removal process, including the progressive step-by-step country selection process with six countries in the last step, followed by the final reference to 8 U.S.C. § 1253(a), "any country which is willing to accept the alien into its territory." *See* INA § 243(a) (1952) (reproduced at Appendix A, 1a).

Like the current statute now codified at § 1231(b)(2), § 1253(a) described a three-step removal process. First, the alien could designate a country of removal. If the Attorney General was unable to obtain that country's acceptance or if the alien failed to make a designation, then the second step directed the Attorney General to deport the alien "to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory." Again, if acceptance could not be obtained, the third step of § 1253(a) directed the Attorney General to the same seven alternatives that are set forth in the current statute under § 1231(b)(2)(E).

Nearly fifty years later, in 1996, Congress passed the Illegal Immigrant Reform and Immigration Responsibility Act ("IIRIRA") Pub. L. No. 104-208, 110 Stat. 3009. Through the IIRIRA, Congress joined the procedures for removing excludable and deportable aliens (the former §§ 1227(a)(2) and 1253(a) into a new § 1231(b)(2)), thus adopting a unified procedure for removing all such aliens. *See Fieran v. INS*, 268 F.3d 340, 343-44 (6th Cir. 2001).

Respondent attempts to argue that the changes to the statute in 1996, in which the statute was re-codified from § 1253(a) to § 1231(b)(2), somehow negate the overwhelming pre-1996 authority holding that acceptance is required. Br. in Opp'n 10. A simple review of the statute before and after the 1996 amendment immediately dispatches this argument. The wording of the statutory provisions is nearly identical, and there are only negligible changes to the relevant punctuation and formatting. *Compare* 8 U.S.C. § 1253(a) (1994) (reproduced at Appendix B, 6a-7a) *with* § 1231(b)(2), *supra*, at 1.

Moreover, the IRRIRA's legislative history confirms that its minor modifications to the statutory language were not intended to be substantive. For instance, the House Judiciary Committee of the House of Representatives explained that "Section 241(b) establishes the countries to which an alien may be removed * * * [and] subsection (b)(2) [present-day § 1231(b)(2)] *restates* the provisions in current sections 243 (a) and (b) [8 U.S.C. § 1253(a)]." H.R. Rep. No. 104-469 at 234 (1996) (emphasis added). Therefore, under the new version and just like the old, the Committee interpreted the statutory procedure to require acceptance:

> An alien ordered removed shall be removed to any country the alien shall designate. If the alien refuses to designate a country, or if removal to the designated country would impair an international obligation or adversely affect U.S. foreign policy, *the removal shall be to any country willing to receive the alien. If no country is willing to receive the alien, the alien shall be detained.*

Id. at 243 (emphasis added).

When enacting the IRRIRA in 1996, Congress had the following historical facts before it: (1) consistent interpretation by the federal courts, including the Second, Ninth, and District of Columbia Circuits, and the BIA's own

1968 and 1985 decisions that the acceptance requirement applied to the six countries in step three as well as to the other steps in Section 243 of the INA; and (2) the acknowledged inability of the INS to deport thousands of aliens to countries from which acceptance could not be obtained, such as the Communist bloc countries during the forty-four years from 1952 to 1996. If, in the face of this history, Congress had intended to change the statutory removal process to eliminate the acceptance requirement, then Congress went about it in a very peculiar way, making only formatting and minor grammatical changes. The only sensible conclusion is that Congress maintained the statutory removal structure, including the important policy of the acceptance requirement. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute" and when Congress reenacts the statute without addressing the existing interpretation, Congress is presumed "to adopt that interpretation").

Indeed, the only remotely substantive change made to the removal statute in 1996 supports a finding that Congress meant to affirm, not abandon, the acceptance requirement. The country of last resort in the former Section 243(a) was described as follows: "if deportation to any of the foregoing place or countries is impracticable, inadvisable, or impossible, then to *any country* which is willing to accept such alien into its territory." *See* Appendix B, 7a (emphasis added). This language was amended in § 1231(b) to read: "If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, *another country whose government* will accept the alien into that country." (Emphasis added.) The change from "any country" to "another country whose government is willing to accept" emphasizes both the acceptance requirement itself and the idea that only a government is capable of providing that acceptance.

D. Proper Statutory Interpretation Of The Acceptance Requirement Avoids Conflicts With International Law.

A statute should be construed when possible to avoid conflict with international law. *See, e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains"); *see also Kim Ho Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001)257 F.3d at 1114 (discussing "the well-established Charming Betsy rule of statutory construction which requires that we generally construe [c]ongressional legislation to avoid violating international law" out of respect for other nations); Restatement (Third) of Foreign Relations Law (1987) ("where fairly possible, a United States statute is to be construed as not to conflict with international law or with an international agreement with the U.S.").

As the Ninth Circuit recognized in *Ali v. Ashcroft*, respondent does not dispute that removal to Somalia would place an alien like petitioner at risk of suffering human rights abuses. 346 F.3d at 885. The DHS itself has found that the desperate situation in Somalia poses a serious threat to the personal safety of any returning Somali. *See DHS Extension of the Designation of Somalia under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-43,150 (July 21, 2003). It is respondent's position that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the Attorney General to remove the alien to the "country" of birth even if there is no functioning government and the "country" is a lawless society. Such a removal scheme, where aliens would be forcibly removed to a geographical place without the prior acceptance by a functioning government, may well subjects human beings to persecution, cruel, inhuman, and degrading treatment or punishment, arbitrary deprivation of life, and the panoply of human rights abuses condemned by customary international law and the provisions of three multilateral treaties to which

the United States is a signatory: (1) Article 33(1) of the United States Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, as incorporated by Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267, 19 U.S.T. 6223; (2) Articles 6 and 7 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and (3) Article 3 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85.

"Although Congress may override international law in enacting a statute, we do not presume that Congress had such an intent when the statute can reasonably be reconciled with the law of nations." *Kim Ho Ma*, 257 F.3d at 1114 n.30. A statutory construction that requires acceptance by the government of the country to which the alien will be removed under 8 U.S.C. § 1231(b)(2)(E) avoids potential conflict with the law of nations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

Section 243(a) of the INA, Public L. No. 414, 66 Stat. 163, 212 (June 27, 1952) (codified at 8 U.S.C. § 1253(a)), the direct predecessor to INA § 241 (8 U.S.C. § 1231) under which *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959) was decided, read as follows:

> COUNTRIES TO WHICH ALIENS SHALL BE DEPORTED; COST OF DEPORTATION
>
> Sec. 243.
>
> (a) The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney

General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) If the United States is at war and the deportation in accordance with the provisions of subsection (a), of any alien, who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation, of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of

reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: *Provided*, That the costs of the deportation of any such alien from such tort shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the

provisions of section 252, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) If deportation proceedings are instituted later than five years after the entry of the, alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237 (b).

(f) When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the Attorney General shall when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and

any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Upon the notification by the Attorney General that any country, upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

APPENDIX B

Prior to the 1996 recodification in 8 USC § 1231, 8 U.S.C. § 1253(a) (1994) read as follows:

§ 1253. Countries to which aliens shall be deported.

(a) Acceptance by designated country; deportation upon nonacceptance by country.

The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable

under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

APPENDIX C

The provision currently governing removal of alien terrorists, INA § 507(b), 8 U.S.C. § 1537(b) ("Custody and removal"), reads as follows:

(b) Custody and removal

(1) Custody

* * *

(2) Removal

(A) In general

The removal of an alien shall be to any country which the alien shall designate if such designation does not, in the judgment of the Attorney General, in consultation with the Secretary of State, impair the obligation of the United States under any treaty (including a treaty pertaining to extradition) or otherwise adversely affect the foreign policy of the United States.

(B) Alternate countries

If the alien refuses to designate a country to which the alien wishes to be removed or if the Attorney General, in consultation with the Secretary of State, determines that removal of the alien to the country so designated would impair a treaty obligation or adversely affect United States foreign policy, the Attorney General shall cause the alien to be removed to any country willing to receive such alien.

(C) Continued detention

If no country is willing to receive such an alien, the Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General, in coordination with the Secretary of State, shall make periodic efforts to

reach agreement with other countries to accept such an alien and at least every 6 months shall provide to the attorney representing the alien at the removal hearing a written report on the Attorney General's efforts. Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate.

(D) Fingerprinting

* * *

Supreme Court, U.S.
FILED
JUL 22 2004
OFFICE OF THE CLERK

No. 03-674

In the Supreme Court of the United States

KEYSE G. JAMA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether immigration officials may remove petitioner to his country of birth pursuant to 8 U.S.C. 1231(b)(2)(E)(iv), when that country lacks a functioning central government that is able either to accept or to object to petitioner's return.

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In the Supreme Court of the United States

No. 03-674

KEYSE G. JAMA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 329 F.3d 630. The opinion of the district court (Pet. App. 42a-55a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 2003. A petition for rehearing was denied on August 6, 2003 (Pet. App. 56a). The petition for a writ of certiorari was filed on November 4, 2003, and was granted on February 23, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, establishes the legal framework governing removal of aliens from the United States. *Inter alia*, the INA specifies the grounds on which

aliens may be removed from this country, see 8 U.S.C. 1227(a) (2000 & Supp. I 2001), and the manner in which removal proceedings are conducted, see 8 U.S.C. 1229 and 1229a. The provision directly at issue in this case, 8 U.S.C. 1231(b)(2), identifies the countries to which an alien (other than an alien arriving at the United States) may be removed.[1] Section 1231(b)(2) provides in pertinent part as follows:

> **(A) Selection of country by alien**
>
> Except as otherwise provided in this paragraph—
>
> (i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and
>
> (ii) the Attorney General shall remove the alien to the country the alien so designates.
>
> **(B) Limitation on designation**
>
> An alien may designate under subparagraph (A)(i) a foreign territory contiguous to the United States, an adjacent island, or an island adjacent to a foreign territory contiguous to the United States as the place to which the alien is to be removed only if the alien is a native, citizen, subject, or national of, or has resided in, that designated territory or island.

[1] For aliens arriving at the United States, the choice of an appropriate country of removal is governed by 8 U.S.C. 1231(b)(1).

> **(C) Disregarding designation**
>
> The Attorney General may disregard a designation under subparagraph (A)(i) if—
>
> (i) the alien fails to designate a country promptly;
>
> (ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;
>
> (iii) the government of the country is not willing to accept the alien into the country; or
>
> (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.
>
> **(D) Alternative country**
>
> If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country—
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or

(ii) is not willing to accept the alien into the country.

(E) Additional removal countries

If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:

(i) The country from which the alien was admitted to the United States.

(ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States.

(iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States.

(iv) The country in which the alien was born.

(v) The country that had sovereignty over the alien's birthplace when the alien was born.

(vi) The country in which the alien's birthplace is located when the alien is ordered removed.

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. 1231(b)(2).

Section 1231(b)(2) thus "sets forth a progressive, three-step process for determining a removable alien's destination country." Pet. App. 4a. At the first step (8 U.S.C. 1231(b)(2)(A)-(C)), the alien may designate a country and must be removed to the designated county unless the Secretary of Homeland Security (Secretary) chooses to disregard the designation based on one of the criteria stated in Section 1231(b)(2)(C).[2] If the alien declines to designate a country of removal, or if the Secretary disregards a designation, the second step of the sequential process is triggered, under which the alien must be deported to the country of which he is a subject, national, or citizen, unless the government of that country refuses to accept the alien or fails to indicate its acceptance within a specified period. 8 U.S.C. 1231(b)(2)(D). If removal is not effectuated pursuant to 8 U.S.C. 1231(b)(2)(A)-(D), the Secretary "must proceed to the third step of the process." Pet. App. 5a. At that third step, the Secretary may remove the alien to any of six countries having a specified prior connection to

---

[2] The petition for a writ of habeas corpus in this case named the Immigration and Naturalization Service (INS) as the respondent. The petition was filed in the district of petitioner's present physical confinement. No objection was raised to petitioner's failure to designate his immediate custodian as the respondent in the action. After the petition was filed, the responsibility for removing aliens was transferred from the Attorney General to the Secretary of Homeland Security, and the INS was abolished. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441, 116 Stat. 2192 (to be codified at 6 U.S.C. 251(2)). The Attorney General remains responsible for the administrative adjudication of removal cases by immigration judges and the Board of Immigration Appeals. See *Aliens and Nationality; Homeland Security; Reorganization of Regulations*, 68 Fed. Reg. 9824, 9830-9846 (2003) (to be codified at 8 C.F.R. Pts. 1001-1337) (Justice Department implementing regulations as recodified after Homeland Security Act).

the alien. 8 U.S.C. 1231(b)(2)(E)(i)-(vi). If it is "impracticable, inadvisable, or impossible to remove the alien to each" of those six countries, the Secretary may remove the alien to "another country whose government will accept the alien into that country." 8 U.S.C. 1231(b)(2)(E)(vii).

b. The INA also limits the circumstances under which an alien may be removed to a country in which he is likely to experience various forms of persecution. The forms of relief that are potentially available to removable aliens include asylum; withholding of removal; protection under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture), 1465 U.N.T.S. 85; and temporary protected status.

i. The INA states that the government "may grant asylum" to an alien who is determined to be a "refugee." 8 U.S.C. 1158(b)(1). The term "refugee" is defined as a person who is "unable or unwilling to avail himself or herself of the protection of" his own country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(42)(A). Under the INA, however, certain categories of aliens are ineligible for asylum. Those include any alien who himself has engaged or assisted in persecution, 8 U.S.C. 1158(b)(2)(A)(i); any alien who, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States," 8 U.S.C. 1158(b)(2)(A)(ii); any alien as to whom "there are reasonable grounds for regarding the alien as a danger to the security of the United States," 8 U.S.C. 1158(b)(2)(A)(iv); and any alien

who is removable on specified grounds related to terrorist activity, 8 U.S.C. 1158(b)(2)(A)(v).

ii. The INA also provides for withholding of removal. The Act states that the government "may not remove an alien to a country" if "the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). As with asylum, however, that limitation on the range of countries to which an alien may be removed is inapplicable to any alien who has engaged or assisted in persecution, any alien who has been convicted of a particularly serious crime and therefore poses a danger to the United States community, and any alien who is reasonably regarded as a danger to national security. 8 U.S.C. 1231(b)(3)(B)(i), (ii) and (iv).

iii. In accordance with the Convention Against Torture, Congress has provided by law that "the policy of the United States [is] not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture." Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822. Congress directed the Executive Branch to implement this aspect of the Convention Against Torture through appropriate regulations. § 2242(b), 112 Stat. 2681-822. Congress further mandated that, "[t]o the maximum extent consistent with the obligations of the United States under the Convention," those implementing regulations "shall exclude from the protection of such regulations aliens described in * * * 8 U.S.C. 1231(b)(3)(B)." § 2242(c), 112 Stat. 2681-822; see generally 8 U.S.C. 1231 note.

The Convention Against Torture has been implemented through regulations of the Department of

Homeland Security. See 8 C.F.R. 208.16-208.18; see also 8 C.F.R. 1208.16-1208.18 (parallel Department of Justice regulations). Under those regulations, an alien within the categories described in 8 U.S.C. 1231(b)(3) (see p. 7, *supra*) is ineligible for withholding of removal. See 8 C.F.R. 208.16(c)(4) and (d)(2). Such an alien may be granted "deferral of removal" to a particular country, however, if he can show that he is "more likely than not to be tortured" in that country. 8 C.F.R. 208.17(a).

iv. The INA vests the Secretary with discretionary authority to grant "temporary protected status," which restricts the removal of aliens who are nationals of a foreign state designated by the Secretary. 8 U.S.C. 1254a(a)(1). Designated countries may include any foreign state for which, because of "ongoing armed conflict" within the state, "requiring the return of aliens who are nationals of that state to that state * * * would pose a serious threat to their personal safety." 8 U.S.C. 1254a(b)(1)(A). More generally, a foreign state may be designated based on the Secretary's determination that "there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety." 8 U.S.C. 1254a(b)(1)(C). To qualify for temporary protected status, an alien from a designated country must satisfy various physical presence, residence, and admissibility requirements. 8 U.S.C. 1254a(c)(1)(A). But Congress has specified that any alien who has been convicted of a felony or two misdemeanors committed in the United States, or who is ineligible for asylum pursuant to 8 U.S.C. 1158(b)(2)(A), is also ineligible for temporary protected status. 8 U.S.C. 1254a(c)(2)(B).

2. Petitioner was born in Somalia and is a citizen of that country. Pet. App. 43a; J.A. 5. He was admitted to

the United States as a refugee in 1996. Pet. App. 43a. Since 1991, Somalia has lacked a functioning central government. *Id.* at 24a. In 1999, petitioner was convicted of felony assault in a Minnesota state court. *Id.* at 44a. Petitioner received a suspended sentence of one year and one day of imprisonment, and he was placed on probation for three years. *Ibid.* Petitioner later violated the conditions of his probation and was required to serve his sentence of imprisonment. *Ibid.*

While petitioner was incarcerated, the Immigration and Naturalization Service (INS) commenced removal proceedings against him based on the assault conviction, as a "crime of moral turpitude" within the meaning of 8 U.S.C. 1182(a)(2)(A)(i)(I). Pet. App. 44a. In his removal proceeding before an immigration judge (IJ), petitioner conceded that he is a removable alien under the INA. *Id.* at 1a; J.A. 18. Petitioner applied for various forms of protection from removal, however, arguing that he will be persecuted if he is returned to Somalia. See Pet. App. 22a-23a.

Petitioner declined to designate a country of removal, and the IJ designated Somalia as the country to which petitioner would be removed. Pet. App. 44a; see J.A. 25. The IJ noted that petitioner's "conviction for the 3rd degree assault offense * * * provided a basis for him to concede removability," J.A. 18, and it denied petitioner's applications for various forms of protection from removal, J.A. 20-25. The IJ explained that petitioner was not entitled to withholding of removal under 8 U.S.C. 1231(b)(3) because his felony assault offense constituted a "particularly serious crime," and his history of violent behavior and alcohol abuse indicated that he would be a danger to the community. J.A. 21-23; see 8 U.S.C. 1231(b)(3)(B)(ii). The IJ also held that petitioner was not entitled to relief under federal regu-

lations implementing the Convention Against Torture. The IJ explained that petitioner was ineligible for withholding of removal under 8 C.F.R. 208.16 because of his criminal conviction, J.A. 23, and that petitioner did not qualify for deferral of removal under 8 C.F.R. 208.17 because he had failed to show that he would more likely than not be tortured by any governmental actor if he were returned to Somalia, J.A. 24-25. The IJ further observed that petitioner's felony assault conviction rendered him ineligible to apply for asylum. J.A. 5-6, 18. The Board of Immigration Appeals (BIA or Board) affirmed the order of removal. J.A. 26-27.[3]

3. In May 2001, the INS issued a warrant of removal notifying petitioner that it intended to execute his removal order. J.A. 30-31; Pet. App. 2a, 44a. The following month, petitioner filed a petition for a writ of habeas corpus, pursuant to 28 U.S.C. 2241, in the United States District Court for the District of Minnesota. Pet. App. 44a. Petitioner argued that the INA bars his removal to Somalia in the absence of a functioning Somali central government that is able and willing to accept his return. *Id.* at 45a. Petitioner did not renew his contention that he would suffer persecution if returned to Somalia. See *id.* at 13a-20a.

Adopting the report and recommendation of a magistrate judge (see Pet. App. 21a-41a), the district court granted the habeas corpus petition. *Id.* at 42a-55a. The court ordered the INS not to remove petitioner from

[3] The Secretary has designated Somalia as a country whose nationals in the United States may apply for temporary protected status to avoid removal during the period of the designation. See 8 U.S.C. 1254a; 68 Fed. Reg. 43,147 (2003). Temporary protected status is not available, however, to any alien who has been convicted of a felony committed in the United States. See 8 U.S.C. 1254a(c)(2)(B)(i); p. 8, *supra*.

the United States "until the government of the country to which he is to be removed has agreed to accept him." *Id.* at 55a.[4] The court agreed with the parties and the magistrate judge that petitioner's removal is governed by 8 U.S.C. 1231(b)(2)(E), and specifically by clause (iv) of that paragraph, which authorizes removal to the alien's country of birth. See Pet. App. 50a-51a. The district court concluded that an alien may not be removed to his country of birth under Section 1231(b)(2)(E)(iv) unless the government of that country "accepts" him. *Id.* at 51a-53a.

4. The court of appeals reversed. Pet. App. 1a-12a.[5]

a. The court of appeals held that the text of 8 U.S.C. 1231(b)(2)(E)(iv) makes clear that acceptance is not required for removal under that provision. Pet. App. 6a. The court explained that other provisions of Section 1231(b)(2) are expressly made contingent on "acceptance" by the government of the receiving country, but that "Congress did not insert an acceptance requirement into the self-contained provisions that appear in clauses (i) through (vi)" of Section 1231(b)(2)(E). *Ibid.* The court concluded that "the 'short answer' to [peti-

[4] The district court rejected the government's contention that petitioner's request for habeas corpus relief was barred by 8 U.S.C. 1252(g), which provides that courts lack "jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to * * * execute removal orders." 8 U.S.C. 1252(g). Citing *INS* v. *St. Cyr*, 533 U.S. 289 (2001), the court explained that Section 1252(g) "does not expressly mention habeas or [28 U.S.C.] § 2241 and it should not be understood to eliminate such review by implication." Pet. App. 46a.

[5] The court of appeals agreed with the district court that 8 U.S.C. 1252(g) does not bar judicial consideration of petitioner's habeas corpus petition. See Pet. App. 3a-4a; note 4, *supra*.

tioner's] assertion (that the INS must obtain prior acceptance before returning him to the country of his birth) is that 'Congress did not write the statute that way.'" *Ibid.* (quoting *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979)).

b. Judge Bye dissented. Pet. App. 9a-12a. In Judge Bye's view, judicial precedent and prior administrative practice established that acceptance by the receiving country's government is a legal prerequisite to removal. *Id.* at 9a-11a. Judge Bye predicted, however, that, "[a]s a practical matter, * * * the task of removing an alien to a country which has not accepted him will only be accomplished and the majority's construction of the statute will only be implicated when there is no functioning government to refuse the alien's acceptance." *Id.* at 11a.[6]

SUMMARY OF ARGUMENT

I. The plain language of 8 U.S.C. 1231(b)(2)(E)(iv) authorizes petitioner's removal to Somalia in the circumstances presented here. Section 1231(b)(2)(E)(iv) states that an alien may be removed to his country of birth, and it contains no language that can reasonably be construed to require acceptance by the government of that country. The *other* portions of Section 1231(b)(2)

[6] On August 6, 2003, the court of appeals denied petitioner's request for rehearing and rehearing en banc. Pet. App. 56a. On August 13, 2003, the court of appeals issued its mandate. In an effort to prevent his removal to Somalia, petitioner then asked the court of appeals to recall its mandate pending his filing of a petition for a writ of certiorari. On August 28, 2003, the court of appeals denied that motion. *Id.* at 57a. On November 4, 2003, petitioner filed a petition for a writ of certiorari, and on November 10, 2003, the court of appeals granted petitioner's renewed motion to recall the mandate and stayed the issuance of its mandate until this Court "takes action on [the] petition for certiorari." J.A. 51.

on which petitioner relies, which describe the legal effect in specified circumstances of a foreign government's refusal to accept an alien, do not support petitioner's construction of Section 1231(b)(2)(E)(iv). For the most part, those provisions *increase* the range of removal options available to the Secretary, by establishing exceptions (in cases where acceptance is refused) to requirements that an alien must be removed to a particular country. Indeed, the express references to acceptance in other parts of Section 1231(b)(2) simply highlight the absence of any such reference in Section 1231(b)(2)(E)(i)-(vi). In addition, construing Section 1231(b)(2)(E)(i)-(vi) not to require acceptance preserves the traditional authority of the Executive Branch to make case-by-case judgments in matters involving foreign relations, and it is consistent with general principles of deference to administrative agencies.

II. The policy rationales that petitioner offers in support of his proposed legal rule are unpersuasive. Although attempts to effect removal without acceptance may often, or even usually, have counterproductive foreign policy consequences, those ill effects may be outweighed in some cases and can be avoided in the other cases without imposing a statutory acceptance requirement. Congress made clear that removal without acceptance is never absolutely *required* by the INA, but it granted the Executive Branch the discretion to identify those relatively rare instances in which removal without acceptance will serve the interests of the United States.

Nor can petitioner's proposed acceptance requirement be justified as a means of protecting aliens against mistreatment after their removal from the United States. The INA contains an array of carefully tailored provisions designed to address the danger of mistreat-

ment in the receiving country. Congress excluded certain individuals from many of those provisions, and based on those statutory exclusions, petitioner does not qualify for relief. To impose a categorical ban on removal to any country that lacks a functioning central government, based on a generalization that such countries are likely to be unacceptably dangerous, would subvert the careful balancing of interests that Congress undertook in crafting other portions of the INA that directly and specifically address concerns about the danger of mistreatment in the receiving country.

III. There is no merit to petitioner's contention that Congress, by failing to amend the INA to provide express authorization for removal without acceptance, ratified a supposed understanding that acceptance is required under the Act. The precedents on which petitioner relies are insufficient to establish the existence of any such understanding, and none of those precedents addresses the situation where a potential country of removal lacks a functioning central government. It is, moreover, an established principle of international law that a country is required to accept the return of its own nationals when a foreign state seeks to expel them. Because Somalia lacks a functioning central government, and the practical and diplomatic concerns that removal without acceptance would ordinarily implicate are absent, the Secretary should not be required to proceed as though an existing foreign government had improperly refused to accept petitioner's return.

ARGUMENT

As the court of appeals correctly held, Somalia's lack of a functioning central government capable of accepting petitioner's return does not preclude his removal to that country pursuant to 8 U.S.C. 1231(b)(2)(E)(iv). In

the usual situation, where the country in which an alien was born is ruled by a functioning central government, any effort to remove the alien to that country without its government's consent is likely to have unacceptable *practical* consequences for the United States. However, because Congress has made clear that the Secretary is not *required* to remove any alien to a country whose government declines to accept him, those consequences can be avoided without making the foreign government's acceptance a legal prerequisite to removal.

That is how 8 U.S.C. 1231(b)(2) operates. In cases where the acceptance of the relevant foreign government cannot be obtained, Congress established exceptions to rules that would otherwise require an alien to be removed to that particular country. Those exceptions protect the ability of the Executive Branch to enforce the immigration laws in a manner that does not cause unacceptable affronts to foreign sovereigns. Section 1231(b)(2) permits removal without acceptance, however, in those (presumably rare) cases where the responsible Executive Branch officials deem that course to be appropriate. Precisely because Somalia lacks a functioning central government capable of either accepting or objecting to petitioner's return, the INS reasonably determined that removal of petitioner to his country of birth is unlikely to cause the adverse diplomatic consequences that removal without acceptance would ordinarily entail. That determination is fully consistent with both the text and the purposes of the relevant INA provisions.

I. THE INA EXPRESSLY AUTHORIZES REMOVAL OF AN ALIEN TO HIS COUNTRY OF BIRTH, AND THE ACT DOES NOT MAKE THAT AUTHORIZATION CONTINGENT ON THE ALIEN'S ACCEPTANCE BY THE RECEIVING COUNTRY'S GOVERNMENT

A. Section 1231(b)(2)(E)(i)-(vi) Of Title 8 Authorizes Removal Of Aliens To Specified Countries Without Reference To Acceptance

Courts construing the INA are "bound to assume that the legislative purpose is expressed by the ordinary meaning of the words used." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (citations and internal quotation marks omitted). That approach is consistent with the Court's more general admonition that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); see *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

As the court of appeals recognized, Section 1231(b)(2) of Title 8 "sets forth a progressive, three-step process for determining a removable alien's destination country." Pet. App. 4a; see pp. 5-6, *supra*. Step one (8 U.S.C. 1231(b)(2)(A)-(C)) and step two (8 U.S.C. 1231(b)(2)(D)) require removal either to a country designated by the alien, or to a country of which the alien is a subject, national, or citizen, unless a statutory exception to those requirements exists. In the instant case, it is undisputed that petitioner was not removed

pursuant to either of the first two steps of that sequential process. See Pet. App. 5a.

Petitioner's removal is therefore governed by 8 U.S.C. 1231(b)(2)(E), which provides that "[i]f an alien is not removed to a country under the previous subparagraphs of this paragraph [*i.e.*, at step one or two], the [Secretary] shall remove the alien to any of the following countries." The countries to which removal is authorized include "[t]he country in which the alien was born." 8 U.S.C. 1231(b)(2)(E)(iv). Neither the introductory language of Section 1231(b)(2)(E), nor the text of clause (iv) of Section 1231(b)(2)(E), states or in any way suggests that the acceptance of the receiving country's government is a legal prerequisite to removal to the alien's country of birth. The INA thus clearly and unambiguously authorizes the Secretary to remove petitioner to Somalia, where he was born, notwithstanding the current absence of any functioning Somali central government capable of accepting his return. Compare *Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 209 (1998) (holding that the Americans with Disabilities Act (ADA) unambiguously covers the administration of state prisons because "the ADA plainly covers state institutions *without* any exception that could cast the coverage of prisons into doubt").

B. The Provisions Surrounding Section 1231(b)(2)(E)(iv) Do Not Suggest That Acceptance By The Government Of The Receiving Country Is A Legal Prerequisite To Removal Of An Alien To His Country Of Birth

Petitioner's statutory argument does not rest on the text of Section 1231(b)(2)(E)(iv) itself or on the introductory language of Section 1231(b)(2)(E). Rather, petitioner relies on *other* portions of Section 1231(b)(2),

which he characterizes as imposing acceptance "requirements." See, *e.g.*, Pet. Br. 19, 20, 24, 25. In petitioner's view, Section 1231(b)(2) will function as a coherent whole only if acceptance by the receiving country's government is treated as a legal prerequisite to removal to the alien's country of birth.

Given the clear and unqualified authorization conferred by Section 1231(b)(2)(E)(iv), petitioner's mode of statutory interpretation is unsound. Although consideration of the larger statutory context is an appropriate aid to construction of a provision that is facially unclear, it should not be used to introduce ambiguity where none otherwise exists. In any event, the inferences that petitioner draws from surrounding portions of Section 1231(b)(2) are unwarranted. Properly understood, those provisions do not suggest that acceptance by the receiving country's government is a generally-applicable legal prerequisite to an alien's removal. To the contrary, the express language in other provisions addressing the consent of the government of a country suggests that Congress knows how to attach significance to the presence or absence of a government's consent, and that the omission of such language in Section 1231(b)(2)(E)(i)-(vi) was purposeful. See pp. 25-26, *infra*. Indeed, the overall structure of Section 1231(b)(2) strongly supports the conclusion that the absence of any express reference to "acceptance" in Section 1231(b)(2)(E)(i)-(vi) is an integral feature of the statute's three-step process for guiding the selection of a country of removal.

1. Petitioner contends (Br. 18) that 8 U.S.C. 1231(b)(2)(C) bars removal without acceptance to a country designated by the alien involved. That is incorrect. Section 1231(b)(2)(A) of Title 8 provides as a general matter that, if an alien designates a preferred

country of removal, "the [Secretary] shall remove the alien to the country the alien so designates." 8 U.S.C. 1231(b)(2)(A)(ii). Section 1231(b)(2)(C), however, establishes exceptions to that requirement. Specifically, Section 1231(b)(2)(C) provides that "[t]he [Secretary] may disregard a designation * * * if," *inter alia*, "the government of the country is not willing to accept the alien into that country." 8 U.S.C. 1231(b)(2)(C)(iii).

Section 1231(b)(2)(C) does not prohibit removal to the designated country absent acceptance by that country's government. To the contrary, Congress's use of the permissive term "may" indicates that the Secretary is not *required* to "disregard" the alien's designation even when acceptance is lacking. See, *e.g.*, *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."). The contrast between Section 1231(b)(2)(A)(ii)'s mandatory "shall remove" language and Section 1231(b)(2)(C)'s "may disregard" language underscores that the Secretary is authorized to remove an alien to a designated country even in the absence of acceptance by the government of that country. See, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (attaching significance to the fact that "Congress' use of the permissive 'may' in [18 U.S.C.] 3621(e)(2)(B) contrasts with the legislators' use of a mandatory 'shall' in the very same section"); *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947) ("[W]hen the same [Federal Rule of Civil Procedure] uses both 'may' and 'shall,' the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory.").

Thus, rather than prohibiting removal without acceptance, Section 1231(b)(2)(C) establishes narrow exceptions to a general rule that an alien *must* be removed to the country that he designates. In this way, Section

1231(b)(2)(C) preserves rather than restricts the Secretary's discretion to enforce the immigration laws in the manner that will best serve the United States' foreign policy interests. That discretion-preserving function is made particularly clear by Section 1231(b)(2)(C)(iv), which allows the Secretary to disregard the alien's designation if removal to the designated country is "prejudicial to the United States." If Section 1231(b)(2)(C) were not included in the statute, the Secretary would be categorically required to remove an alien to the country that the alien has designated, without regard either to the receiving government's objections or the Executive Branch's own desire to avoid needless affronts to foreign states. Section 1231(b)(2)(C) safeguards the Executive Branch from that predicament: it ensures that an objection by the relevant foreign government (as well as any other potential source of "prejudic[e] to the United States") can be taken into account in determining whether the alien's designation should be honored or "disregard[ed]." Section 1231(b)(2)(C) therefore provides no support for petitioner's contention that the INA limits the Secretary's authority to choose between potential removal sites by categorically mandating acceptance by the receiving country's government as a prerequisite to removal.[7]

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[7] Section 1231(b)(2)(C) further provides that the Secretary "may disregard" the alien's designation "if * * * the government of the [designated] country does not inform the [Secretary] finally, within 30 days after the date the [Secretary] first inquires, whether the government will accept the alien into the country." 8 U.S.C. 1231(b)(2)(C)(ii). That provision operates to preserve the flexibility of the Executive Branch by making clear that it is not required to transport the alien to the border of the designated country absent advance assurance that the foreign government will accept his return. It also ensures that the Secretary is not required to wait indefinitely if a foreign government fails to respond to a request for acceptance; rather, the alien can be removed to an alternative country chosen in accordance with the INA after a defined interval has passed. Under petitioner's theory of the statute, however, Section 1231(b)(2)(C)(ii) would presumably *bar* removal to the designated country if the relevant foreign government did not indicate its acceptance within the 30-day period—even if acceptance was provided shortly thereafter and the Secretary believed that returning the alien to the designated country would serve the interests of the United States.

2. Petitioner's reliance (*e.g.*, Br. 19-20) on 8 U.S.C. 1231(b)(2)(D) is misplaced for essentially the same reason. Section 1231(b)(2)(D) addresses removal to a country of which the alien is a subject, national, or citizen. In pertinent part, it states that the Secretary "shall remove" the alien to such a country, "unless the government of the country * * * is not willing to accept the alien." 8 U.S.C. 1231(b)(2)(D)(ii). As with Section 1231(b)(2)(C), that provision does not prohibit removal without acceptance. Rather, Section 1231(b)(2)(D)(ii) identifies cases in which acceptance is lacking as an exception to an otherwise mandatory requirement that, if the alien is not removed to a designated country pursuant to Section 1231(b)(2)(A)-(C), he must be removed to his country of nationality. Like Section 1231(b)(2)(C)(iii), Section 1231(b)(2)(D)(ii) thus preserves Executive Branch discretion, allowing the Secretary to choose among a larger number of potential removal countries (those identified in Section 1231(b)(2)(E)) and to avoid unwanted confrontations with foreign governments.[8]

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[8] Contrary to petitioner's assertion (Br. 27), construing 8 U.S.C. 1231(b)(2)(E)(i)-(vi) to authorize removal without acceptance does not render Section 1231(b)(2)(D) "superfluous." Under Section 1231(b)(2)(D), the Secretary is *precluded* from removing an

3. Clause (vii) of 8 U.S.C. 1231(b)(2)(E) provides that, "[i]f [it is] impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph [*i.e.*, 8 U.S.C. 1231(b)(2)(E)(i)-(vi)]," the alien may be removed to "another country whose government will accept the alien into that country." 8 U.S.C. 1231(b)(2)(E)(vii). Petitioner argues (*e.g.*, Br. 24-25) that Congress's inclusion of an acceptance requirement in Section 1231(b)(2)(E)(vii) reflects a more general understanding that acceptance by the receiving country's government is *always* a legal prerequisite to removal. That argument is misconceived.

Whereas clauses (i)-(vi) of Section 1231(b)(2)(E) address removal to countries with pre-existing connections to the alien involved, clause (vii) is a "catchall" provision that authorizes removal even to countries with which the alien has no prior link. Under subsection (vii), acceptance by the government of the receiving country furnishes the *only* basis for selecting a particular foreign state with no other obvious connection to the alien as the country of removal. Congress's decision to require acceptance in that circumstance does not logically imply that acceptance is legally necessary before an alien can be removed to, *e.g.*, the country where he was born.

The introductory language of clause (vii) of Section 1231(b)(2)(E), moreover, significantly undermines petitioner's argument that acceptance by the receiving

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alien to an alternative country pursuant to Section 1231(b)(2)(E) if the government of the country of which the alien is a subject, national, or citizen is willing to accept the alien. Section 1231(b)(2)(D) therefore will have operative legal effect whether or not acceptance is a legal prerequisite to removal under Section 1231(b)(2)(E)(i)-(vi).

country's government is categorically required. Under that provision, Executive Branch officials are authorized to invoke the catchall authority of clause (vii) only when it is "impracticable, inadvisable, or impossible to remove the alien to each country described in" clauses (i)-(vi). That standard, rather than the consent of the government of the countries specified in clauses (i)-(vi), governs the Secretary's discretion in selecting among the countries identified in those provisions. If a particular foreign state has a functioning central government that withholds acceptance, it will typically be "impracticable" or "inadvisable," if not "impossible," to remove an alien to that country. In the context of a country without a functioning government, however, Executive Branch officials may determine that removal to that country (when the option is available under clauses (i)-(vi)) is both feasible and appropriate even though acceptance cannot be obtained. The willingness or unwillingness of the receiving country's government to accept the alien will inform the Secretary's application of clause (vii)'s threshold requirement, but removal under clauses 1231(b)(2)(E)(i)-(vi) is not subject to any freestanding "acceptance requirement."[9]

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[9] As petitioner observes (Br. 24, 41), when removal to the countries identified in Section 1231(b)(2)(E)(i)-(vi) is "impracticable, inadvisable, or impossible," Section 1231(b)(2)(E)(vii) authorizes removal to "*another* country whose government will accept the alien." 8 U.S.C. 1231(b)(2)(E)(vii) (emphasis added). Petitioner infers from the word "another" a congressional understanding "that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts." Pet. Br. 24. That inference is unfounded. The word "another" simply reflects the fact that Section 1231(b)(2)(E)(vii) authorizes removal to countries *different from* those described in Section 1231(b)(2)(E)(i)-(vi). By way of analogy, it would be wholly natural to say that a student "intends to transfer from his current school to another college with

4. Essentially for the reasons stated above, there is no merit to petitioner's contention (Br. 25) that an "acceptance requirement permeates" 8 U.S.C. 1231(b)(2). Rather than adopting a categorical rule of the sort petitioner advocates, Congress has specified particular points in the three-step sequential process at which the presence or absence of acceptance by the receiving country's government will affect the range of removal options legally available to the Executive Branch. For the most part, the provisions that expressly refer to acceptance *increase* Executive Branch flexibility by creating exceptions to requirements that aliens must be removed to specified countries. See pp. 18-21, *supra*. Clause (vii) of Section 1231(b)(2)(E)—the sole provision within Section 1231(b)(2) that imposes an acceptance requirement in order to *limit* Executive Branch discretion—applies only when the United States government seeks to remove an alien to a country with which he has

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a better history department." Obviously that sentence would not imply that the student's current school has a better history department than itself. Compare *Barnhart* v. *Thomas*, 124 S. Ct. 376, 381 (2003).

It is significant, in this regard, that the word "another" did not appear in the predecessor version of Section 1231(b)(2)(E)(vii). See 8 U.S.C. 1253(a)(7) (1994) ("[I]f deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept [the] alien into its territory."). The word "another" was added in 1996, when former Section 1253(a)(7) was amended and recodified pursuant to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, § 305(a)(3), 110 Stat. 3009-602. Because "protecting the Executive's discretion from the courts * * * can fairly be said to be the theme of" IIRIRA, *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 486 (1999), that Act is not plausibly construed to have added an acceptance requirement where none previously existed.

no pre-existing connection. The provisions on which petitioner relies do not suggest, either singly or in combination, that acceptance by the government of the receiving country is an invariable legal prerequisite to removal.[10]

To the contrary, the fact that Section 1231(b)(2) contains provisions that *expressly* define the legal effect of a foreign government's acceptance (or absence thereof) in particular circumstances negates any reasonable inference that the authorization conferred by Section 1231(b)(2)(E)(i)-(vi) is subject to an *implied* acceptance requirement. As this Court has repeatedly emphasized, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (brackets omitted). That canon of construction is especially apposite when the relevant inclusions and omissions appear within the same section of the same statute, and when the provisions at issue are as

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[10] Petitioner is therefore wrong in arguing (Br. 26) that, under the government's construction of Section 1231(b)(2), acceptance is a prerequisite for removal to the countries with the closest connection to the alien involved, but not for removal to countries having a more attenuated connection. In fact, Section 1231(b)(2) requires acceptance *only* when the Secretary seeks, pursuant to Section 1231(b)(2)(E)(vii), to remove an alien to a country with which he has *no* prior link—*i.e.*, when the receiving government's acceptance furnishes the *only* basis for choosing a particular country as the site of removal. The provisions of Section 1231(b)(2)(C) and (D) simply make clear that, if the relevant government withholds its acceptance, an alien need not be removed to the country he has designated or to his country of nationality, even though those nations would otherwise constitute the preferred countries of removal.

"comprehensive and reticulated" as those in 8 U.S.C. 1231(b)(2). See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 208 (2002).

5. Petitioner also contends (Br. 31-32) that, because Somalia lacks a functioning central government, it is not even a "country" within the meaning of Section 1231(b)(2), and that removal of aliens to Somalia is therefore unauthorized irrespective of any "acceptance" requirement. Petitioner did not raise that claim in the court of appeals, and the court accordingly decided the case on the understanding that Somalia is a "country" for purposes of Section 1231(b)(2). Petitioner also failed to raise that claim in his petition for a writ of certiorari, and the question whether Somalia qualifies as a "country" under the INA is not fairly included within the question presented in that petition. This Court therefore should not consider petitioner's contention that Somalia is not a "country." See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (This Court "ordinarily do[es] not consider questions outside those presented in the petition for certiorari.").

In any event, that claim lacks merit. See 69 Fed. Reg. 42,901 (2004) (clarifying Secretary's construction of Section 1231(b) as providing that "a 'country' for the purpose of removal is not premised on the existence or functionality of a government in that country"). As this Court explained in *Smith* v. *United States*, 507 U.S. 197, 201 (1993), construing the Federal Tort Claims Act (FTCA), the "commonsense meaning" of the term "country" is "'[a] region or tract of land.'" Indeed, the Court held in that case that Antarctica is a "country"

within the meaning of the FTCA "even though it has no recognized government." *Ibid.* The fact that clauses (i)-(vi) of Section 1231(b)(2)(E) use the term "country," while provisions that address acceptance refer to the "government of the country" (see 8 U.S.C. 1231(b)(2)(C)(ii) and (iii), 8 U.S.C. 1231(b)(2)(D)), reinforces the conclusion that the term "country" refers to a geographic region distinct from any sovereign governing body.

C. To The Extent 8 U.S.C. 1231(b)(2)(E)(iv) Is Ambiguous, This Court Should Defer To The Executive Branch's Reasonable Interpretation Of That Provision, Thereby Preserving The Traditional Discretion Of The Executive Branch In Matters Of Foreign Relations

The authority of the Executive Branch to remove aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542 (1950); see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952) (immigration powers are "intricately interwoven" with other quintessentially executive powers such as the foreign relations and war powers). Determining the appropriate response when a foreign government refuses to accept an alien who is otherwise removable to that country, or when the country in question lacks a functioning central government, necessarily involves an assessment of the likely foreign policy consequences either of removing the alien or of allowing him to remain in the United States. To the extent that the statutory language is regarded as ambiguous, this Court should not lightly assume that Congress intended to divest the Executive Branch of its usual preeminence in the conduct of foreign affairs.

Background administrative law principles reinforce the appropriateness of deference to the Executive Branch's reasonable construction of the disputed statutory language. As recently amended (see note 2, *supra*), the INA assigns enforcement power to the Secretary of Homeland Security, see Homeland Security Act of 2002, Pub. L. No. 107-296, § 402, 116 Stat. 2178 (to be codified at 6 U.S.C. 202(3)), and adjudicatory power to the Attorney General, see Pub. L. No. 107-296, § 1311, 116 Stat. 2289 (to be codified at 6 U.S.C. 1103(g)(1)). Under the prior enforcement regime, it was settled law that the Attorney General's reasonable construction of the INA was entitled to deference. See, *e.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 423-425 (1999); *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-845 (1984). In May 2001, before the enactment of the Homeland Security Act, the INS issued to petitioner a warrant of removal to enforce the decisions of the IJ and BIA. See J.A. 30-31; Pet. App. 2a. That administrative effort to effect petitioner's removal to Somalia necessarily rested on the legal position that the current absence of a functioning central government in that country does not preclude removal under the INA. Neither the Secretary nor the Attorney General has since altered that legal position. Under those circumstances, the former INS's interpretation of the statute, as reflected in that agency's administrative enforcement efforts, is entitled to judicial deference.[11]

[11] In light of the recent creation of the Department of Homeland Security (DHS) and the transfer of certain immigration-related responsibilities to the Secretary (see note 2, *supra*), and to eliminate any possible uncertainty regarding the Executive Branch's construction of Section 1231(b)(2) with respect to the question presented here, the DHS and the Department of Justice (DOJ) recently issued a joint notice of proposed rulemaking. See 69 Fed. Reg. 42,901 (2004). That notice, and the proposed DHS and DOJ regulations, address, *inter alia*, the question whether a foreign government's acceptance is a legal prerequisite to removal under 8 U.S.C. 1231(b)(2)(E)(i)-(vi). The proposed rules articulate the agencies' interpretation that acceptance is not required under those provisions. See 69 Fed. Reg. at 42,910-42,911 (proposed DHS rule 8 C.F.R. 241.15(e)); *id.* at 42,911 (proposed DOJ rule 8 C.F.R. 1240.10(f)). The proposed rules also reflect the agencies' position that the absence of a functioning central government in the receiving country does not impose a legal barrier to removal. See *id.* at 42,910 (proposed DHS rule 8 C.F.R. 241.15(c)); *id.* at 42,911 (proposed DOJ rule 8 C.F.R. 1240.10(f)); see also notes 15 & 16, *infra*.

II. THE POLICY JUSTIFICATIONS ADVANCED BY PETITIONER IN SUPPORT OF HIS PROPOSED LEGAL RULE ARE UNPERSUASIVE

In support of his contention that Section 1231(b)(2) categorically establishes acceptance by the receiving country's government as a legal prerequisite to removal, petitioner offers two basic policy justifications for such a rule. First, petitioner asserts that to permit removal without acceptance "denigrates the sovereignty of other nations and undermines the congressional determination that the Executive Branch should treat other nations respectfully." Pet. Br. 28; see Pet. Br. 25-26 (arguing that "Congress could not have intended to give the Attorney General discretion to remove an alien to [countries such as Mexico, Canada, or western European nations], whose close relationship with the United States necessarily requires 'respect for sovereignty,' without that country's acceptance"). Second, petitioner contends that "removal to Somalia would place an alien like petitioner at risk of suffering human rights abuses," Pet. Br. 42; see Pet. Br. 10 n.10,

and he suggests that the same will generally be true of removal to any country that lacks a functioning central government, see Pet. Br. 19 & n.14. Those arguments do not support adoption of the legal rule that petitioner advocates.

A. A Categorical Statutory Ban On Removal Without The Relevant Foreign Government's Acceptance Is Unnecessary To Prevent The Practical Harms To The Nation's Foreign Relations That Removal Without Acceptance May Entail

"As a matter of historical practice, [the Executive Branch] has not attempted with any frequency to remove aliens to a particular foreign country * * * if the country has a functioning central government and that government objects to the alien's entry. As a practical matter, removal to a country with a functioning central government is very unlikely to occur unless that government at least implicitly 'accepts' the alien." 69 Fed. Reg. 42,903 (2004) (joint notice of proposed rulemaking issued by the Department of Justice and the Department of Homeland Security) (see note 11, *supra*). That longstanding practice reflects the judgment of the Executive Branch that the adverse foreign policy consequences of attempting to repatriate an alien over the objection of the receiving nation's functioning government would virtually always outweigh any benefit to the United States that the alien's removal from this country would entail.

In order to prevent those adverse consequences, however, it was not necessary for Congress to enact a statutory *prohibition* on removal without acceptance. So long as the statutory scheme does not *require* removal without acceptance under any circumstances, the foreign policy interests of the United States

can adequately be protected through the judicious exercise of Executive Branch discretion.[12] Congress preserved the Secretary's ability to avoid needless affronts to foreign governments by enacting 8 U.S.C. 1231(b)(2)(C)(iii) (which provides, at step one of the sequential process, that the alien need not be removed to the country he designates if the relevant foreign government withholds its acceptance); 8 U.S.C. 1231(b)(2)(D)(ii) (which establishes a similar exception to the step-two requirement that the alien be removed to the country of his nationality or citizenship); and 8 U.S.C. 1231(b)(2)(E)(vii) (which allows the Secretary

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[12] As a matter of historical practice, the United States has not attempted to remove aliens absent sound reasons to believe that the receiving country's government will accept the alien's return. There are, however,

> a variety of ways in which foreign governments have manifested their willingness to "accept" a removed alien. Acceptance has not always been expressed through any formal declaration or documentation, and it has not always been specific to an individual alien—an established, agreed-upon practice for dealing with a particular class of aliens has been sufficient. Removal practices vary from country to country. In fact, ICE [Immigration and Customs Enforcement] uses several methods to accomplish the physical removal of aliens from the United States. For example, ICE officers may escort an alien to the United States border, and watch the alien cross the border into a foreign country such as Mexico without more than a determination that the individual is of Mexican nationality or citizenship.

69 Fed. Reg. 42,903 (2004); see *id.* at 42,903-42,904 (describing logistics of removal process in various circumstances). The absence of any standardized or mandatory formal process for verifying the receiving government's acceptance reinforces the conclusion that acceptance is typically obtained in order to protect the practical and diplomatic interests of the United States, not to vindicate any legal right of the alien involved.

to remove the alien to a country with which he has no prior connection if it is "impracticable, inadvisable, or impossible to remove the alien to" the countries specified in Section 1231(b)(2)(E)(i)-(vi)). See pp. 18-23, *supra*. In exercising the discretion conferred by those provisions, the Secretary can be expected to "consult as appropriate with the Secretary of State" in order to ensure that the selection of a country of removal is consistent with the foreign policy interests of the United States. 69 Fed. Reg. 42,906 (2004). The statutory scheme thus safeguards against the adverse foreign relations consequences that removal without acceptance would ordinarily entail, while allowing removal without acceptance in those rare instances—primarily if not exclusively cases in which the reason for the lack of acceptance is the absence of a functioning central government in the country of removal—when the Executive Branch believes that course to be in the national interest.[13]

In arguing that a categorical statutory acceptance requirement is needed to avoid unnecessary and counterproductive affronts to foreign governments, petitioner implicitly assumes that the Executive Branch officials charged with enforcing the immigration laws cannot be trusted to distinguish on a case-by-case basis between those relatively limited instances in which removal without acceptance will advance the interests of the United States and the many instances in which it will not. Petitioner offers no evidence to substantiate that bleak assessment, nor is there any reason to believe that Congress shared that view. To the contrary, Congress in enacting Section 1231(b)(2) vested the Executive Branch with significant discretion to protect the national interest through its application of statutory standards to individual cases. See 8 U.S.C. 1231(b)(2)(C)(iv) (Secretary may disregard the alien's designation of a country of removal "if the [Secretary] decides that removing the alien to the country is prejudicial to the United States"); 8 U.S.C. 1231(b)(2)(E)(vii) (Secretary may effect removal to a country with which the alien has no prior connection if it is "impracticable, inadvisable, or impossible to remove the alien to" the countries described in Section 1231(b)(2)(E)(i)-(vi)).[14]

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[13] Petitioner contends that the government's construction of Section 1231(b)(2) "necessarily involves reading into the statute an exception for failed states or countries which are too undeveloped to resist." Pet. Br. 26. That is incorrect. Under the plain language of the INA, the Secretary is *legally* authorized to remove an alien to *any* country specified in 8 U.S.C. 1231(b)(2)(E)(i)-(vi), even if the relevant foreign government has not accepted the alien's return. As a *practical* matter, however, that authority is unlikely to be exercised except where the reason for the lack of acceptance is that no functioning central government exists in the pertinent foreign state. See 69 Fed. Reg. at 42,904; see also Pet. App. 11a (Bye, J., dissenting) (predicting that "the task of removing an alien to a country which has not accepted him will only be accomplished * * * when there is no functioning government to refuse the alien's acceptance").

[14] We are informed by the Department of Homeland Security that approximately 3400 Somali nationals are currently subject to final orders of removal (of whom approximately 35 are currently detained), approximately 4850 more are in pending removal proceedings, and approximately 324 Somali nationals (or aliens having no nationality who last habitually resided in Somalia) have been granted temporary protected status (see p. 7-8, *supra*; 36-39, *infra*). If petitioner prevails in this case and removable aliens cannot lawfully be removed to Somalia, and if no other government will accept them, their detention pending the formation of a functioning Somali government presumably will be foreclosed by this Court's decision in *Zadvydas* v. *Davis*, 533 U.S. 678 (2001). The government's inability to remove aliens to Somalia is particu-

B. Petitioner's Proposed Categorical Bar On Removal Without Acceptance Would Subvert The Careful Balancing Of Interests Struck By Congress In Other INA Provisions That Comprehensively And Directly Address The Danger That A Removed Alien May Suffer Mistreatment In The Country Of Removal

Petitioner argues that the absence of a functioning central government will generally lead to hazardous conditions within the relevant nation, and that the prospect of those dangers justifies a categorical bar on removal to such a country. See Pet. Br. 19-20 & n.14, 42-43. That argument is misconceived. The federal immigration laws contain an array of provisions under which an alien may contest removal by alleging that he will be mistreated if he is returned to a particular foreign country. See pp. 6-8, *supra*. Adoption of the blunderbuss rule that petitioner advocates would subvert the careful balancing of interests struck in those provisions.

First, most of the relevant INA and regulatory provisions require the individual alien who is contesting removal to demonstrate a likelihood that *he personally* will suffer *specified harms* if he is returned to the country at issue. Thus, an alien may be granted asylum "if the [Secretary] determines that such alien is a refugee" within the meaning of the statutory definition,

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larly worrisome in light of Somalia's observed connections to terrorist activity. See United Nations, *Report of the Panel of Experts in Somalia Pursuant to Security Council Resolution 1474* (Oct. 29, 2003) (describing activities of international terrorists in Somalia); State Department, *Patterns of Global Terrorism 2002, Africa Overview* 6 (Apr. 20, 2003) (same) <http://www.state.gov/s/ct/rls/pgtrpt/2002/pdf/>; CRS Report for Congress, *Africa and the War on Terrorism* 16-17 (Jan. 17, 2002) (same).

8 U.S.C. 1158(b)(1); and the INA defines "refugee" to mean an individual who cannot return to or obtain the protection of his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1101(42)(a). Withholding of removal to a particular country similarly is available "if the [Secretary] decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A); see *INS* v. *Stevic*, 467 U.S. 407, 421-430 (1984) (holding, under the predecessor version of the statute, that withholding of deportation requires proof that the alien would more likely than not suffer persecution on one of the specified grounds). And regulations implementing the Convention Against Torture require an applicant for withholding or deferral of removal to establish that he would "more likely than not" be tortured in the proposed country of removal. 8 C.F.R. 208.16(c)(2) and 208.17(a); see J.A. 23-25 (IJ denies petitioner's application for deferral of removal under the Convention Against Torture based on petitioner's failure to satisfy the "more likely than not" standard). Petitioner's proposed rule, under which removal to certain assertedly dangerous countries would be categorically precluded, without regard to the likelihood that the particular alien under a final order of removal would suffer mistreatment (or any specific type of mistreatment), is inconsistent with the nuanced approach reflected in those provisions.

Second, most of the INA provisions that authorize relief from removal based on a likelihood of future mistreatment specifically exclude from eligibility various categories of aliens who are convicted criminals,

abusers of human rights, threats to national security, or possible or actual terrorists. See, *e.g.*, 8 U.S.C. 1158(b)(2) (asylum); 8 U.S.C. 1231(b)(3)(b) (withholding of removal); 8 U.S.C. 1254a(c)(2)(B) (temporary protected status). In the instant case, for example, the IJ noted that petitioner was "not eligible to seek asylum, as his conviction for 3rd degree assault for which he received a sentence of one year and one day is an aggravated felony." J.A. 5-6; see Pet. Br. 9 (acknowledging that "[p]etitioner's criminal conviction made him ineligible for asylum and withholding of removal"). The rule that petitioner advocates reflects no such limitations. Given the comprehensive and carefully tailored way in which Congress has addressed the risk that a removed alien might suffer harm in the country to which he is returned, it is implausible to suppose that Congress would have categorically barred the removal of *any* alien to a country without a functioning central government, based simply on the generalization that such countries are likely to be dangerous.

Petitioner's construction of Section 1231(b)(2) is especially unlikely in light of the INA provisions governing "temporary protected status." See 8 U.S.C. 1254a. Under Section 1254a, the Secretary may grant temporary protected status to individual aliens, and thereby render those aliens not removable to a particular country, if the Secretary finds, *inter alia*, that "there is an ongoing armed conflict within the state" that "would pose a serious threat to [the] personal safety" of returned aliens. 8 U.S.C. 1254a(b)(1)(A). More generally, a designation may be based on the Secretary's finding "that there exist extraordinary and temporary conditions in the foreign state that prevent aliens who are nationals of the state from returning to the state in safety." 8 U.S.C. 1254a(b)(1)(C). Pursuant to Section

1254a, the Secretary has designated Somalia as a country whose nationals in the United States may apply for temporary protected status. See note 3, *supra*.

Temporary protected status thus requires a formal Executive Branch finding that particular hazards exist in the designated country. Even then, the Secretary's grant of relief under Section 1254a is discretionary for any individual alien. See 8 U.S.C. 1254a(a)(1) (Secretary "may grant" temporary protected status to an alien who satisfies the statutory criteria); 8 C.F.R. 244.2, 244.10. By contrast, petitioner's approach rests on an irrebuttable presumption that any country lacking a functioning central government is unacceptably dangerous, and it would make deferral of removal of particular aliens mandatory rather than discretionary.[15]

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[15] In extending the designation of Somalia as a country whose nationals are eligible to apply for temporary protected status, the Secretary referred to the fact that Somalia has "lack[ed] a central authority" since the fall of Mohammed Siad Barre's regime in 1991. See 68 Fed. Reg. 43,148 (2003). The Secretary has not relied solely on the current absence of a functioning central government, however, but has engaged in a more detailed examination of conditions on the ground. See *ibid.*; Pet. Br. 5-6. The legal rule proposed by petitioner would render that inquiry largely superfluous. Indeed, the designation of Somalia pursuant to 8 U.S.C. 1254a—first made by the Attorney General in 1991 and extended annually since then, see 68 Fed. Reg. at 43,148—would serve no evident purpose if Somalia were not a permissible country of removal under 8 U.S.C. 1231(b)(2). While recognizing that Somalia currently lacks a functioning central government, the Secretary premised his extension of Somalia's designation on an express finding that "requiring the return of aliens who are nationals of Somalia * * * would pose a serious threat to their personal safety." 68 Fed. Reg. at 43,148; see 8 U.S.C. 1254a(b)(1)(A). Although the notice extending Somalia's designation did not refer to 8 U.S.C. 1231(b)(2), the extension of the temporary protected status designation implicitly presumes that Somali nationals otherwise remain subject to removal to that

And while an applicant for temporary protected status (unlike an applicant for asylum or for withholding or deferral of removal) need not make an individualized showing of likely harm to himself personally, the alien must satisfy various physical presence, residence, and admissibility requirements. 8 U.S.C. 1254a(c)(1)(A).

When Congress enacted the provisions authorizing the Executive Branch to grant temporary protected status, it expressly excluded from eligibility any alien (like petitioner) who has been convicted of a felony committed in the United States. 8 U.S.C. 1254a(c)(2)(B). Congress thus balanced the interest in preventing possible hardship in the country of removal against the need to remove particularly dangerous aliens from the United States. As a result of his felony conviction, petitioner is specifically precluded from invoking the Executive Branch's formal determination, pursuant to Section 1254a, that conditions in Somalia are sufficiently hazardous to warrant designation under the statutory criteria. Petitioner nevertheless contends that Section 1231(b)(2), by absolutely prohibiting removal to any country that lacks a functioning central government, serves indirectly to protect removable aliens from essentially the same dangers that temporary protected status is intended to address directly, subject to explicit exceptions. It may well be true, as petitioner suggests, that the absence of a functioning central government is an indicator of dangerous conditions within a country's borders. Congress would not likely have intended, however, for that generalized assessment to form the basis for restrictions on removal that are *more sweeping* than the restrictions that flow from a formal

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country, notwithstanding its lack of a functioning central government.

Executive Branch finding that hazardous conditions actually exist at a particular place and time. Adoption of petitioner's legal theory therefore would subvert the careful balancing of interests reflected in Section 1254a.

III. THERE IS NOT AND HAS NEVER BEEN ANY ESTABLISHED UNDERSTANDING THAT THE ACT REQUIRES ACCEPTANCE AS A LEGAL PREREQUISITE TO REMOVAL, OR THAT IT PROHIBITS REMOVAL TO A COUNTRY THAT LACKS A FUNCTIONING CENTRAL GOVERNMENT

Petitioner contends (Br. 32-43) that the INA has consistently been understood to require the receiving country's acceptance as a precondition to removal, and that Congress has ratified that understanding by declining to amend the Act so as to authorize removal without acceptance. That argument is misconceived. Because the Executive Branch as a matter of *policy* has historically eschewed efforts to remove aliens without the receiving government's acceptance, courts have very rarely addressed the question whether acceptance is *legally* required. The slim body of precedent on which petitioner relies is insufficient to establish the sort of settled construction of which congressional awareness might be presumed. In any event, petitioner cites no authority at all for the proposition that the INA precludes removal to a country that lacks a functioning central government.

A. As A Matter Of International Comity, Executive Branch Officials Historically Have Not Attempted To Remove Aliens Over The Objection Of The Receiving Country's Government

In *In re Anunciacion*, 12 I. & N. Dec. 815, 818 (1968), the BIA stated that "obviously, the United States cannot deport an alien to a country which will not accept her." The Board did not suggest, however, that the barrier to removal in the absence of acceptance was imposed by the INA, or that the circumstances under which acceptance was (or was not) obtained implicated the rights of the alien herself. To the contrary, the BIA stated that "the question of whether or not a specified country will accept the alien as a deportee is one of comity concerning solely the United States and the country in question." *Id.* at 817.

Since the Board's decision in *Anunciacion*, the Executive Branch officials charged with enforcing the Nation's immigration laws have continued to regard a functioning foreign government's refusal to accept an alien as an essentially dispositive *practical* barrier to removal to the country over which that government exercises authority. "As a matter of historical practice, [the Executive Branch] has not attempted with any frequency to remove aliens to a particular foreign country if the country has a functioning central government and that government objects to the alien's entry." 69 Fed. Reg. 42,903 (2004). Because the INA does not under any circumstances *require* removal to a country whose government will not accept the alien (see pp. 18-21, *supra*), the validity of that historical practice does not depend on the existence of any legal bar to removal without acceptance.

The operating instructions and regulations on which petitioner relies (Pet. Br. 37) simply recognize that, in

the usual case where the potential country of removal has a functioning central government, that government's acceptance must as a practical matter be obtained before the alien can be removed. Those instructions and regulations do not reflect any implicit premise that the acceptance of an existing foreign government is a *legal* prerequisite to removal. Still less do they suggest that removal is precluded in the rare situation where the potential country of removal lacks a functioning central government that is capable either of accepting or objecting to the alien's return.[16]

B. The Judicial And Administrative Decisions On Which Petitioner Relies Do Not Establish Any Settled Understanding That The Receiving Government's Acceptance Is A Legal Prerequisite To Removal

1. For the most part, the judicial decisions on which petitioner relies (see Br. 33) do not support his position. In *United States ex rel. Hudak* v. *Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), aff'd, 96 F.2d 1023 (2d Cir. 1938),

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[16] In *Ali* v. *Ashcroft*, 346 F.3d 873, 884-885 (9th Cir. 2003), the court of appeals construed certain INS regulations as reflecting an implicit premise that the receiving government's acceptance is a legal prerequisite to removal under 8 U.S.C. 1231(b)(2). The court's reliance on those regulations was misplaced. The pertinent rules simply reflect the fact that removal is typically impracticable if the receiving country's government will not accept the alien; they do not suggest that acceptance is *legally* required. In their recent joint notice of proposed rulemaking, the Departments of Justice and Homeland Security have solicited public comment on regulatory provisions that would state explicitly that acceptance is not a legal prerequisite to removal under Section 1231(b)(2)(E)(i)-(vi). See note 11, *supra*. In order to eliminate any potential ambiguity as to the agencies' position, that notice also proposes amendments to certain of the regulatory provisions on which the *Ali* court relied. See 69 Fed. Reg. 42,910 (2004).

the district court stated that the United States government's power to deport aliens who have unlawfully entered the country "is limited only by the power of the native sovereignty to refuse to receive the alien if it so chooses." The court presumed that, if the Executive Branch attempted to deport an alien and the receiving country's government refused acceptance, "the alien will undoubtedly be returned to the United States." *Ibid.* The court did not suggest, however, that the need for the foreign government's acceptance was the product of domestic law or that it was intended to protect the alien's own interests. To the contrary, the court held that "the alien has no right to raise such a question in the courts of the United States." *Ibid.* The district court in *Hudak* thus treated the barrier to removal without acceptance as arising out of practical exigency, and perhaps out of international norms governing relationships between sovereign nations, rather than as a feature of the domestic law relationship between the United States and the deportable alien. And because the *Hudak* court's analysis focused on the "power of the native sovereignty," *ibid.*, the court's opinion does not logically suggest that removal is precluded when the receiving country has no sovereign governing body.[17]

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[17] Similarly, the snippets of legislative history of the 1952 Act on which petitioner relies (Br. 38-39) simply recognize that removal without acceptance is typically impracticable. Indeed, it is noteworthy that, notwithstanding the difficulties caused during the middle part of the last century by the refusal of Communist governments to accept the return of their own nationals (see *ibid.*), petitioner identifies no instance in which a legislator or Executive Branch official proposed to amend the federal immigration laws so as to eliminate a purported statutory acceptance requirement. The absence of such proposals at least suggests a shared understanding that the barrier to deportation in those circumstances reflected

Petitioner's reliance (Br. 34-35) on *Chi Sheng Liu* v. *Holton*, 297 F.2d 740 (9th Cir. 1961); *Pelich* v. *INS*, 329 F.3d 1057 (9th Cir. 2003); and *Lee Wei Fang* v. *Kennedy*, 317 F.2d 180 (D.C. Cir.), cert. denied, 375 U.S. 833 (1963), is likewise misplaced. To the extent that those decisions suggest the existence of an acceptance requirement, their analysis is generally consistent with the view that the relevant foreign government's acceptance is a practical rather than a legal

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practical and diplomatic concerns rather than the existence of a statutory prohibition.

Petitioner also relies (Br. 40) on the legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (see note 9, *supra*). The passage that is block-quoted in petitioner's brief, however, pertains not to Section 1231(b)(2), but to 8 U.S.C. 1537(b)(2), a separate and differently-worded provision dealing with removal of alien terrorists pursuant to special procedures. Section 1537(b)(2), moreover, contains no reference to "acceptance" by the "government" of the receiving country. Rather, removal under that provision is to a country designated by the alien unless Executive Branch officials conclude that removal to the designated country would "impair the obligation of the United States under any treaty * * * or otherwise adversely affect the foreign policy of the United States." 8 U.S.C. 1537(b)(2)(A). Like Section 1231(b)(2)(C), Section 1537(b)(2)(A) thus *allows* the Secretary to disregard the alien's designation of a country of removal, based on the adverse foreign policy consequences that removal without acceptance might entail, but it does not *prohibit* removal without acceptance. If the alien is not removed to a country he has designated, Section 1537(b)(2)(B) directs the Secretary to "cause the alien to be removed to any country willing to receive such alien." That provision does not require that a "government" exist in the country of removal. If no functioning central government operates in a particular foreign country, but the Secretary determines that an alien's removal to the country can be effected without encountering resistance, it can properly be said that the "country" is "willing to receive such alien."

prerequisite to removal. In none of those decisions was the existence of an acceptance requirement essential to the court's disposition of the case, which in each instance was favorable to the government. See *Chi Sheng Liu*, 297 F.2d at 742-744 (upholding challenged removal on the ground that the country of removal had accepted the alien); *Pelich*, 329 F.3d at 1058-1062 (upholding alien's ongoing detention during the process of determining his country of citizenship); *Lee Wei Fang*, 317 F.2d at 183-188 (upholding removal of mainland Chinese to Taiwan and Hong Kong, rather than to Communist China).

2. Only two of the decisions on which petitioner's congressional ratification argument is based—*United States ex rel. Tom Man* v. *Murff*, 264 F.2d 926 (2d Cir. 1959), and *Rogers* v. *Lu*, 262 F.2d 471 (D.C. Cir. 1958) (per curiam)—held orders of deportation to be invalid on the ground that the consent of the relevant foreign government had not been properly obtained. In *Tom Man*, it is not clear that the government contested the proposition that the foreign state's acceptance was a prerequisite to removal of the alien involved. The court of appeals simply stated—without analysis—that removal under the predecessor to 8 U.S.C. 1231(b)(2)(E) was "subject to the condition expressed in the seventh subdivision [the predecessor to Section 1231(b)(2)(E)(vii)]: i.e., that the 'country' shall be 'willing to accept' him 'into its territory.'" 264 F.2d at 928. The court then rejected the contention that such acceptance could be ascertained at the time the alien was "produced at [the Chinese] border," and held that the alien could be deported only if the willingness of the Chinese government to accept him had been previously ascertained. *Ibid.*

In *Lu*, the entirety of the per curiam court's analysis was as follows:

> The defendant, the Attorney General, appeals from a judgment that he "may not deport the plaintiff, Alfred Dodge Lu, to the mainland of China until and unless the Chinese People's Republic has advised the defendant that it is willing to accept the plaintiff into the mainland of China." We find no error.

262 F.2d at 471. Because the isolated and sparsely reasoned decisions in *Tom Man* and *Lu* cannot reasonably be viewed as establishing a settled construction of the INA, there is no sound basis for inferring congressional ratification of the proposition that acceptance by the receiving country's government is a legal prerequisite to removal.

3. Petitioner's reliance (Br. 36) on the BIA decisions in *Anunciacion* and *In re Linnas*, 19 I. & N. Dec. 302 (1985), is also misplaced. Although the Board in *Anunciacion* treated the receiving government's refusal to accept an alien as a practical bar to removal, it did not suggest that acceptance was required by the INA, and it characterized the question of acceptance as "one of comity concerning solely the United States and the country in question." 12 I. & N. Dec. at 817; see p. 40, *supra*. In *Linnas*, the Board simply accepted the Second Circuit law established in *Tom Man* for the purpose of deciding a case that arose in that circuit. See 19 I. & N. Dec. at 307 (stating that "the language of [Section 1231(b)(2)'s predecessor] expressly requires, *or has been construed to require*, that the 'government' of a country selected under any of the three steps must indicate it is willing to accept a deported alien into its 'territory'") (emphasis added) (citing *Tom Man*). *Lin-*

nas, moreover, did not involve a situation in which the failure of the receiving government to accept the alien's return was claimed to foreclose removal. Rather, the BIA's passing reference to the purported need for acceptance came in the course of its determination that the New York City offices of the Republic of Estonia did not constitute a "country" to which the alien could be deported. See *id.* at 304-305.[18]

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[18] Petitioner also relies (Br. 36-37) on an opinion issued by the Office of Legal Counsel (OLC) of the Department of Justice. See Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service (OLC Feb. 20, 2003) <http://www.usdoj.gov/olc/INSDetention.htm>. That opinion addressed, *inter alia*, the circumstances under which a removable alien may permissibly be detained for more than 90 days during the pendency of the removal process. See *id.* at 15-24. In explaining why the removal process may sometimes take longer than 90 days, the opinion described step three of the sequential process as follows:

> If the country of the alien's citizenship or nationality declines to accept the alien, the Attorney General is instructed to attempt to remove the alien to one of six listed countries, including the country in which the alien was born and the country from which the alien was admitted to the United States. *See* [8 U.S.C. 1231(b)(2)(E)(i)-(vi)]. Each of those countries, of course, would have to be separately negotiated with by the United States, and would also have to be given an appropriate amount of time—presumably 30 days—to decide whether to accept or reject the alien.

Id. at 27 n.11. That description of the way in which the removal process will often operate is consistent with the understanding that the receiving government's acceptance is typically a practical, though not a legal, prerequisite to an alien's removal. In any event, Section 1231(b)(2) was not the subject of OLC's advice, and the opinion did not address the situation where acceptance cannot be obtained because the relevant foreign country lacks a functioning central government.

C. Petitioner Identifies No Precedent Suggesting The Existence Of A Settled Understanding That Aliens May Not Be Removed To A Country That Lacks A Functioning Central Government

Petitioner's claim of congressional ratification is particularly misconceived because *none* of the judicial and administrative precedents on which he relies has addressed the situation in which the country of removal lacks a functioning government capable of accepting or objecting to the alien's return. Absent any prior judicial or administrative analysis of the INA's application in that scenario, petitioner cannot plausibly allege the existence of a settled understanding of the statute that Congress might be thought to have ratified.

In that regard, it is significant that the *reason* for treating the acceptance of a functioning foreign government as a practical necessity for removal has no application in the current setting. When a functioning central government exists in the country of removal, obtaining that government's acceptance serves important interests in international comity. See *Annunciacion*, 12 I. & N. Dec. at 817-818. Conversely, any effort to force or smuggle an alien into a foreign state over the receiving government's objection would entail a breach of that country's control over its own borders, with evident potential for international tension.

When the reason for the lack of any manifestation of governmental acceptance is the absence of any functioning central government, however, removal is unlikely to implicate the interest in maintaining comity with foreign sovereigns. And, as the record in this case makes clear, Somali nationals can be removed to that country without a forcible entry into Somalia or an evasion of local law. See J.A. 37-39. Thus, even if a

longstanding consensus as to the appropriate conduct of federal immigration policy could impose an extra-textual restriction on the Secretary's authority to remove aliens over the objection of the receiving government, the practical and diplomatic concerns that underlie that consensus are inapposite here.

Finally, to the extent that background understandings of appropriate immigration practice may bear on the construction of Section 1231(b)(2)(E)(i)-(vi), it is an established principle of international law that "the State of nationality is under a duty towards other States to receive its nationals back on its territory." Paul Weis, *Nationality and Statelessness in International Law* 46 (1979). "[W]hen a State is prevented from returning a foreign national to the State of his nationality by the latter's refusal to receive him back, the foreign State may demand from the State of nationality that it should * * * readmit its national, on the ground of the duty of the State to grant to its nationals the right to reside on its territory. That duty of the State towards its nationals under municipal law becomes a duty towards other States; it becomes an obligation of international law." *Ibid.* (footnote omitted). Thus, if Somalia had a functioning central government, and the Secretary sought to remove petitioner to that country, the Somali government would be required under international law to accept him, and the United States would have the right to insist on performance of that obligation.

As a practical matter, there are limits on the steps that the United States might realistically be expected to take in order to accomplish the return of an alien to his country of nationality if the government of that country refused to comply with its obligations under international law to accept the alien. Thus, if a functioning Somali government refused to accept petitioner's return, we may assume for present purposes that the United States would not threaten international comity by attempting to force or smuggle petitioner into that country. The United States' forbearance in that circumstance, however, would reflect an accommodation of practical and diplomatic exigencies, not an acknowledgment that a foreign sovereign is *entitled* to refuse entry to its own nationals. Where those practical and diplomatic concerns are absent, Congress would not likely intend to require the Executive Branch to behave *as though* a foreign government had refused acceptance, when such a refusal would violate that government's obligations under international law. Rather, it is reasonable to conclude that Congress has permitted the Executive Branch to proceed in these circumstances on the assumption that the government of the other country, if a functioning-one was in existence, would fulfill its international obligations and accept the return of its nationals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Writ Of Certiorari To
The United States Court Of Appeals
For The Eighth Circuit

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INTRODUCTION

The plain meaning of 8 U.S.C. § 1231(b)(2), which governs the selection of countries to which aliens may be removed, requires there to be a functioning government in the country of removal that will accept the alien. The statutory language does not support respondent's claim that the statute grants the Attorney General discretion to deport the alien to the country of which the alien is a subject, national, or citizen, when no government exists to accept the alien or when a government in that country refuses acceptance—just because that country also happens to be the alien's country of birth.

Requiring acceptance by the government of the removal country as a condition of deportation fosters the interest of the United States in stable and orderly repatriation. Congress did not just authorize removal of aliens out of the country and grant the Executive the discretion to adopt rules and regulations as it saw fit to accomplish the task. Rather, the statute sets forth a carefully prescribed step-by-step process with various limitations including the order in which countries should be chosen for removal, the identity of those countries, the timing of removal, and the consequences of an inability to remove. These limitations reflect the importance to the United States of a stable and orderly removal process. There is no exception in the statute that eliminates the acceptance requirement when acceptance cannot be obtained because the targeted country of removal is a failed state with no government to accept the alien. If such an exception is to be created, it should not be by administrative fiat.

ARGUMENT

I. Removal Under 8 U.S.C. § 1231(b)(2) Requires Acceptance From The Government Of The Receiving Country.

A. The Plain Language Of The Statute Requires Acceptance At Each Step.

1. *As A Somali National, Petitioner Cannot Be Removed To Somalia Without Acceptance.*

The most common country of removal is the country of which the alien is a "subject, national, or citizen." § 1231(b)(2)(D).[1] Should the country of nationality not accept the alien, § 1231(b)(2)(D) does not grant the Attorney General the discretion to "remove anyway." If Congress had intended to give the Attorney General discretion to remove the alien to a country of nationality despite the inability to get acceptance from a government in that country, then it would have included language in § 1231(b)(2)(D) granting such discretion. Congress has done so in other immigration and removal statutes. *See, e.g.*, 8 U.S.C. § 1231(a)(3) (an alien not removed shall be "subject to supervision under regulations prescribed by the Attorney General"); § 1231(a)(4)(B)(i) (authorizing Attorney General to remove certain imprisoned aliens before completion of sentence if he determines removal is "appropriate and in the best interest of the United States"). Indeed, respondent argues that Congress granted discretion in another part of § 1231(b)(2) itself, by specifying—as it did not do in § 1231(b)(2)(D)—that the Attorney General "may" disregard an alien's designation under some circumstances. § 1231(b)(2)(C). This provision

[1] Respondent refers to petitioner as a "citizen of Somalia," Resp. Br. 8, and also as a "citizen and national of Somalia," Br. in Opp'n 3. Generally, respondent refers to the "country of which the alien is a subject, national, or citizen" under § 1231(b)(2)(D) as the "country of nationality." Resp. Br. 21. Petitioner adopts this abbreviated reference.

makes the absence of discretion in § 1231(b)(2)(D) all the more conspicuous.[2]

That lack of discretion ends the possibility of removing petitioner to Somalia. Section 1231(b)(2)(D) provides that the Attorney General shall remove to the country of nationality "unless" there is no acceptance by the government. Since Somalia is petitioner's country of nationality, and Somalia has not accepted him, petitioner cannot be removed to Somalia at this time.

Respondent attempts to avoid this obstacle by arguing that § 1231(b)(2)(D) and § 1231(b)(2)(E) together "preserve[] Executive Branch discretion by allowing the Secretary to choose among a larger number of potential removal countries (those identified in § 1231(b)(2)(E)) and to avoid unwanted confrontations with foreign governments." Resp. Br. 21. But § 1231(b)(2)(E) does not add the explicit grant of discretion missing in § 1231(b)(2)(D). Rather, subparagraph (E) provides a list of "additional" countries to which the Attorney General may remove the alien if removal cannot be accomplished because the Attorney General cannot obtain acceptance from the government of the country of nationality. Neither § 1231(b)(2)(D) nor § 1231(b)(2)(E) contains any language suggesting that the Attorney General may overcome the lack of acceptance from the government of the country of nationality simply by removing the alien to that country in a manner that the Attorney General decides is in the national interest.

Respondent explains this discrepancy by stating that if, but only if, the country of nationality also happens to be one

[2] The parties agree that petitioner was not removed to Somalia, his country of nationality, under § 1231(b)(2)(D). Resp. Br. 16-17. The inability to remove petitioner under step two coupled with the failure to find an "additional country" as required under step three should have ended the removal efforts to Somalia until a recognized government in Somalia emerges to accept his return.

of the countries listed in § 1231(b)(2)(E)(i)–(vi), then the Attorney General can exercise the discretion missing in § 1231(b)(2)(D). Resp. Br. 16-17. Congress should not be presumed to have established a haphazard scheme of discretion running in and out of the removal process.

Respondent argues that it was important to Congress that the Attorney General have authority to decide whether acceptance from a functioning government should be required on a case-by-case basis. Resp. Br. 13. But respondent's interpretation is ad-hoc and unfaithful to the text. It makes no sense to limit the Attorney General's power to override a lack of acceptance to *only* the countries listed in § 1231(b)(2)(E)(i)–(vi). If Congress had intended to grant the Attorney General discretion, it could have provided simply that "the Attorney General shall remove the alien outside the United States unless the Attorney General decides that it would be prejudicial to the interests of the United States to do so." What Congress did instead in step three was provide a list of other countries that the Attorney General could turn to if the alien could not be removed to the country of nationality because there was no acceptance.

2. *Acceptance Is Required By All Subparts Of § 1231(b)(2)(E).*

Because petitioner is a Somali national his removal is governed by § 1231(b)(2)(D), and the Attorney General cannot slip the bonds of subparagraph (D) by then selecting Somalia as the country of birth under § 1231(b)(2)(E)(iv). Moreover, even if Somalia were not the country of nationality (but happened still to be the country of birth), § 1231(b)(2)(E)(iv) would nevertheless require acceptance from a government there.

Respondent argues that § 1231(b)(2)(D) mentions acceptance from the country of nationality while the first six subparts of § 1231(b)(2)(E) do not and suggests that Congress acted purposefully in this "omission." Resp. Br.

25. Section 1231(b)(2)(D), however, does not *add* an acceptance requirement that is then omitted from subparagraph (E).[3] Rather, acceptance by the country of removal is a precondition for any removal. The use of the word "unless" does not indicate an additional requirement to the general rule but an exception to that rule when a condition of performance—acceptance—is not met.

If there is no acceptance under § 1231(b)(2)(D), then the Attorney General must move to the list of other countries in step three, § 1321(b)(2)(E). It was unnecessary to add a clause with the words "unless the government of the country does not accept" as a modifier or preamble to the six countries listed in § 1231(b)(2)(E)(i)–(vi) because step three is the final step of the process. Reaching this step means that at least one country has already failed to accept the alien, and he cannot be removed to that country—even if the non-accepting country happens also to be listed in § 1231(b)(2)(E).

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[3] Respondent argues that under *Russello v. United States*, 464 U.S. 16 (1983), omission of an acceptance requirement from § 1231(b)(2)(E)(i)–(vi) must be deemed intentional to the extent the requirement is present in earlier subparagraphs. Resp. Br. 25. Acceptance, however, is a necessary condition to any removal in the statute, not an add-on that is later omitted. Respondent also misapprehends *Russello*, which simply looked to the RICO statute as a whole and construed it to avoid a redundant interpretation of two similar definitional provisions. *See* 464 U.S. at 23. Moreover, *Russello* set forth only a "presumption," which may be overcome by legislative history. *See id.* at 23, 26-29 (observing, however, that the legislative history was consistent with its holding). Finally, *Russello*'s broad language is confined to situations where the provisions compared are the same or similar. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435-36 (2002) (observing that *Russello* inference "grows weaker with each difference in the formulation of the provisions under inspection"). Here, unlike 18 U.S.C. § 1963(a)'s nearly identical definitions, § 1231(b)(2)'s component parts are not worded or structured similarly or meant to stand alone. And neither the legislative history nor the overall structure and purpose of § 1231(b)(2) supports respondent's argument.

In any case, § 1231(b)(2)(E) *does* expressly set forth the requirement that the government of any removal country accept the alien. Section 1231(b)(2)(E)(vii) specifically references "another country whose government will accept the alien into that country." This seventh subpart is an integral part of § 1231(b)(2)(E) and must be read in conjunction with the first six subparts.[4] It expresses the necessary condition that applies to all removals in the preceding subparts: there must be a government in the country of removal to accept the alien.[5]

Respondent also points to the language of subpart (vii) referring to situations in which it is "impracticable, inadvisable, or impossible" to remove to one of the subpart (i)–(vi) countries, and argues that this gives the Attorney General the authority to remove an alien, without the receiving country's acceptance, if it is practicable, advisable, or possible to do so. Resp. Br. 23. This language, however, merely provides the Attorney General with an option of not

[4] Respondent's interpretation of § 1231(b)(2)(E)(i)–(vi) depends on reading these subparts of subparagraph (E) as "self-contained provisions" severed from the rest of paragraph § 1231(b)(2). Resp. Br. 11, 17-18. But paragraph § 1231(b)(2) is the relevant "self-contained provision," not its constituent subparagraphs and subparts, which must be considered together to discern their overall meaning.

[5] Respondent attempts to minimize the impact of the use of the word "another" in subpart (vii) by arguing that the country in subpart (vii) will be different from the countries in subparts (i)–(vi). Resp. Br. 23 n.9. Respondent supports this view by way of analogy, noting that it would be wholly natural to say that a student "intends to transfer from his current school to another college with a better history department" and this would not imply that the student's current school has a better history department than itself. Of course, by including the phrase "better history department" respondent has not only foreordained the result but has constructed a phrase that has no parallel in the statute. There is no such comparative term in subpart (vii). The better analogy would be to say that the student "intends to transfer from Brown to another college in the Ivy League that will accept him." Acceptance is a prerequisite of the transfer as it was for initial admission to Brown.

removing the alien to one of those qualifying countries even though acceptance could be obtained. In other words, the statute contains no *affirmative* authorization to remove the alien so long as it is "practicable, advisable, or possible" to do so. The limited authority to not remove the alien, for example on grounds of impracticality, should not be confused with the much broader authority respondent advocates—the authority to remove an alien to one of the six countries in (i)–(vi) "even though acceptance cannot be obtained." Resp. Br. 23. This is demonstrated by the fact that the preliminary condition of subpart (vii), "if impracticable, inadvisable or impossible to remove the alien to each country described in a previous clause of this subparagraph," is immediately followed by the specific reference to removal to "another country whose government will accept the alien into that country."

3. *There Is No Grant Of Discretion In Other Parts Of The Statute To Overcome The Acceptance Requirement.*

Respondent attempts to conjure a grant of discretion to remove to the country of nationality without acceptance by arguing that "Congress's use of the permissive term 'may' [in § 1231(b)(2)(C)] indicates that the Secretary is not *required* to 'disregard' the alien's designation even when acceptance is lacking." Resp. Br. 19 (emphasis in original). The limited discretion to disregard an alien's designation if the country does not offer timely acceptance translates, in the view of respondent, to a grant of discretion to *honor* the designation despite the objection or lack of consent of the designated country. Of course, respondent is correct in stating that the word "may" indicates "some degree of discretion." *Id.* But no basis in the plain language of subparagraph § 1231(b)(2)(C) exists for the assertion that the limited discretion to veto an alien's preference encompasses the much broader discretion to disregard a foreign government's lack of consent. The word "may" thus does

not indicate a choice between respecting or ignoring the wishes of the receiving country. Rather, the consequence of the alien's choice not to designate a country, or the Attorney General's exercise of his discretion not to remove the alien to the chosen country, is that the Attorney General will move to the next step of the selection process, set forth in subparagraph (D), to determine whether the "alternative country" of the alien's citizenship or nationality will accept removal.

B. Removal Under § 1231(b)(2) Can Only Be To A Country With A Government That Can Accept The Alien.

Congress did not grant discretion to the Attorney General in this statute to simply find a way to remove aliens to some other place in the world. Thus, when the statute says the Attorney General shall "remove" the alien to a "country," it means there must be a transfer of the alien from the jurisdiction of the United States government to the jurisdiction of the government of a country willing to accept the alien.[6] *Delany v. Moraitis*, 136 F.2d 129, 131 (4th Cir. 1943) ("[T]he deportation of an alien is not a mere matter of taking him beyond the seas and setting him down on foreign soil * * *. It must be carried out through arrangements made with the foreign government.")

Petitioner's interpretation of the removal statute is rooted in the historical understanding that the country of removal is "a foreign state with the rights and responsibilities under international law of a member of the family of nations." *Ng Kam Fook v. Esperdy*, 320 F.2d 86, 88 (2d Cir.), *cert. denied*, 375 U.S. 955 (1963). This explains why there is always a reference to a "government" of the removal "country" whenever the statute elaborates upon removal. *E.g.*, § 1231(b)(2)(C)(ii)–(iii), § 1231(b)(2)(D); § 1231(b)(2)(E)(vii).

The process of "removal" entails an arrangement with a government of the country of removal to accept the alien and provide the returning alien a legal identity upon arrival. Resp. Br. 31 n.12. Thus removal is accomplished through a mechanism of acceptance and exchange whereby the alien is transferred from the government of the United States to the government of another country.[7]

In the context of the removal statute, the courts have consistently found that the term "country" is more than a

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[6] Respondent raises the preliminary objection that petitioner's argument that Somalia is not a removal "country" as defined in the statute is not properly before the Court. Resp. Br. 26. This issue is fairly included in petitioner's question presented. *See* Sup. Ct. R. 14.1(a); *see also Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). The issue of acceptance is intimately tied to the issue of Somalia's status as a "country" under the law. If the "country of birth" in § 1231(b)(2)(E)(iv) has no functioning government it cannot accept the alien.

As the Eighth Circuit stated, "if prior acceptance is required, the INS will be unable to return Mr. Jama to Somalia. *This is because Somalia lacks a functioning central government, rendering it impossible for the INS to obtain Somalia's prior acceptance.*" Pet. App. 6a (emphasis added). The dissenting opinion below noted that a "'functioning central government' is an 'essential aspect' of a 'country' to which an alien can be deported." *Id.* at 11a. Furthermore, the specific arguments were fully briefed by both sides at the district court level. *Id.* at 34a n.7. On appeal to the Eighth Circuit the same arguments fell within the question presented, and they were addressed in detail in an amicus brief for rehearing en banc and respondent's response to that brief. Hence, this argument is in support of a claim properly presented and well within the question presented to the Court. *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995).

[7] Respondent suggests that the United States has no acceptance mechanism in place for removal to Mexico other than the unilateral determination of citizenship by U.S. immigration officials and a trip to the border. Resp. Br. 31 n.12. Specific memorandums, however, are in place between the Mexican and American governments regarding the return of foreign nationals, and every week the United States provides the Mexican government with a list of persons to be returned to Mexico.

geographic location. *See Delany*, 136 F.2d at 130 ("But a man's 'country' is more than the territory in which its people live. The term is used generally to indicate the state, the organization of social life which exercises sovereign power on behalf of the people."); *Chan Chuen v. Esperdy*, 285 F.2d 353, 353 (2nd Cir. 1960) ("In line with the general Congressional policy of facilitating the deportation of deportable aliens, we think that any place possessing a government with authority to accept an alien deported from the United States can qualify as a 'country' under the statute.") (citations omitted); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (concluding that Formosa was a "country" because "there [wa]s a government on Formosa which has undisputed control of the island").

Ying v. Kennedy, 292 F.2d 740 (D.C. Cir. 1961), dealt specifically with the definition of "country" in the context of a step-three removal. In holding that Hong Kong was a "country" under the statute the court reasoned that, in addition to having a defined geographical territory, it had well established, functioning governmental institutions including a legislature and royal governor.[8] "Suffice it to say that Hong Kong has authority to determine whether it will accept a deported alien from the United States." 292 F.2d at 743.

The Board of Immigration Appeals has held that the word "country" in the removal statute means a country with a government. *In re Linnas*, 19 I. & N. Dec. 302 (BIA 1985). In *Linnas*, the BIA listed two prerequisites for a "country": first, "a foreign place with 'territory' in a geographical

[8] In contrast, the Department of Homeland Security has found that Somalia is a lawless place where there is no functioning government. "Major regions of the country are under the control of bandits and the population is beyond the reach of the rule of law." *See DHS Extension of the Designation of Somalia Under Temporary Protected Status Program*, 68 Fed. Reg. 43,147-50 (July 21, 2003).

sense;" and second, "a 'government' in the sense of a political organization that exercises power on behalf of the people subjected to its jurisdiction." *Id.* at 307.[9]

Respondent argues that "country" can mean a geographical region or tract of land without a government. Resp. Br. 26-27. Respondent does not cite a single federal court opinion or administrative decision during the fifty-year life of the subject removal statute interpreting the removal authorization to include deportation to a mere territory, place, or "country" without a government to accept the alien from the United States and thus repatriate him. Respondent instead relies upon *Smith v. United States*, 507 U.S. 197 (1993), which gave a "commonsense meaning" of the term "country" under the FTCA as "'[a] region or tract of land.'" *Id.* at 201 (holding that Antarctica is a "'country, even though it has no recognized government'"). The Court's next sentence, however, warned: "To be sure, this is not the only possible interpretation of the term, and it is therefore appropriate to examine other parts of the statute before making a final determination." *Id.* The Court reasoned that "[i]f Antarctica were not a 'foreign country,' and for that reason included within the statute's coverage, the FTCA would instruct courts to look to the law of a place that has no law in order to determine the liability of the United States—surely a bizarre result." *Id.* at 201-02.

To hold that "country" in the removal statute simply refers to a tract of land or any such place without a functioning government would lead to "a bizarre result" in this removal case. A tract of land or a war-torn territory without a sovereign government cannot enter into

[9] Contrary to respondent's suggestion, Resp. Br. 45, *Linnas* was not constrained to follow *Tom Man* because it was a Second Circuit decision. *See In re Punu*, 22 I. & N. Dec. 224, 226-27 (BIA 1998) (declining to follow the law of its circuit). No appellate authority contrary to *Tom Man* existed until this case.

repatriation agreements or issue passports or other travel documents to accomplish removal, nor can it accept an individual into its borders. Reading the necessity of a functioning government out of the term "country" in § 1231(b)(2) would mean that the alien could be transferred from the government of the United States to a place or territory where there is no government to assume jurisdiction upon the alien's arrival.

II. The Removal Statute Does Not Grant The Attorney General Policy Discretion To Remove Aliens To Places Without A Government To Accept.

Respondent argues that Congress intended that the Executive should have broad case-by-case discretion to carry out removal in a manner that would best serve the United States. Thus, it argues, if the Attorney General determines that he can physically accomplish removal to a place where there is no government recognized by the United States and that this can be done without harming the diplomatic interest of the United States, then he is operating within the congressional authorization. During the half-century that the removal statute has been in effect, however, it has never been interpreted this way despite Executive Branch arguments and deportation attempts to the contrary.

Respondent does not cite any judicial decision in the past fifty years suggesting that acceptance was only a practical hurdle that the Attorney General could surmount if circumstances warranted. On the contrary, the conduct of the immigration service was always guided by the rule that acceptance by the receiving country was a fundamental condition of removal. *See* INS Operations Instruction 243.1; 8 C.F.R. §§ 241.4(k)(1) & 241.5(c)(1).

In *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959), for example, the immigration authorities planned to deport the alien to his country of birth, China. There was, however, no government in Communist China

through which the United States could make a repatriation arrangement or obtain acceptance. The government argued that it should be able to accomplish removal by bringing the alien to the border of Mainland China to see whether he would be "accepted" without any prior arrangement, and that it should not have had to attempt to gain acceptance from a government in Mainland China, because "to rule otherwise will be to invade the prerogative of the Executive Department by compelling it to do something that would or might be deemed a 'recognition of' the Communist Government." 264 F.2d at 928. Just as in the present case involving Somalia, the planned removal of Tom Man to China involved a situation where: (a) there was no functioning government with whom any repatriation arrangement could be made; (b) the Attorney General claimed that there were important policy reasons underlying the use of his discretion about how to accomplish removal; and (c) the Attorney General said he could accomplish removal without any arrangement for acceptance. But the Second Circuit, like all other federal courts before the Eighth Circuit here, interpreted the removal statute to require acceptance from a government in the removal country at each step of the removal process. *See* 264 F.2d at 928 ("In each case there must be a mutual agreement between that 'country' and ourselves * * *.")

Tom Man was not an isolated decision that usurped Executive discretion to deport to a country having no government to accept the alien. The Cold War and later deportation cases never suggested that removal through arrangements with a government of the removal country, which was capable and willing to accept the alien, was not a fundamental condition of deportation under § 243(a) of the Immigration and Nationality Act of 1952. *See, e.g.*, *Chan Chuen*, 285 F.2d at 353 (government with authority to accept the alien qualifies); *Rogers*, 280 F.2d at 664-65 (the acceptance requirement explained in *Tom Man* was fulfilled

by letter from Consul General of receiving country); *Cheng v. INS*, 521 F.2d 1351, 1353 (3d Cir. 1975) ("there is no appropriate government with which we have diplomatic relations for purposes of directing a request for admission of an alien pursuant to § 1253(a)"); *Pelich v. INS*, 329 F.3d 1057, 1061 (9th Cir. 2003) (step-three removal to alien's country of birth possible assuming the country would take him).[10]

Respondent characterizes petitioner's claim as one that he should not be removed to Somalia because Somalia is a dangerous place where he will be mistreated; respondent then argues that petitioner has already been found ineligible for the statutory human rights protections such as asylum or withholding of removal. Resp. Br. 34-39. This misconstrues petitioner's habeas claim: the Attorney General must comply with the removal statute, which, petitioner contends, requires acceptance from a government in Somalia. The fact that Somalia is a lawless, war-torn place with no government is not the reason why petitioner's habeas relief should be granted, but it underscores that the statutory requirement cannot be satisfied.[11]

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[10] The importance of the acceptance requirement to the removal process is demonstrated by its inclusion in the special statute governing removal of alien terrorists. 8 U.S.C. § 1537(b)(2). If respondent were correct in its assertions about how Congress gave the Executive broad discretion to remove without acceptance on a case-by-case basis, the context where discretion would most likely be needed and claimed would be that of removal of alien terrorists. But "[i]f no country is willing to receive such an alien [terrorist]," then detention is the congressionally mandated alternative. § 1537(b)(2)(C).

[11] Amicus Washington Legal Foundation agrees with the parties that the Court has jurisdiction over petitioner's claim. Amicus Br. 14-15 (concurring that *INS v. St. Cyr*, 533 U.S. 289, (2001) governs petitioner's habeas claim). Amicus nevertheless requests that the Court "address" whether the Court would have jurisdiction over habeas claims of non-criminal aliens. This clearly would constitute an unconstitutional advisory opinion. *See Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792); *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions about issues as to which there are not adverse parties before us.")

III. This Court Should Not Defer To Respondent's New Proposed Rule.

A. This Court's Precedent Bars Deference On This Pure Question Of Law.

Respondent argues that any ambiguity in the statute should be resolved by deferring to the Executive's interpretation. Resp. Br. 27-28.[12] But because this matter can be decided by traditional methods of statutory construction, the Court need not look to additional sources for guidance, such as respondent's new proposed rule (published July 19, 2004, three days before respondent's brief was filed).[13]

In any event, deference to an agency's interpretation of a statute is *not* appropriate on a "pure question of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). In that case, the Court expressly rejected the INS's argument for *Chevron* deference, *see id.* at 446, and remarked that the issue was "well within the province of the judiciary." *Id.* at 448 (comparing statutory requirements for asylum, i.e., a "well founded fear" (of persecution) and

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[12] Although the Executive's immigration powers are *related* to such Executive powers as foreign relations and war powers, the Constitution grants Congress principal authority over immigration and naturalization and over the Executive's role in removing aliens from the United States. U.S. Const. art. I, § 8, cl. 4; *see also* Pet. Br. 17-18. Here, Congress has exercised its power and prescribed a removal process. Given Congress' constitutional authority and action, the Court should not presume that Congress intended to confer upon the Executive the broad discretion respondent suggests.

[13] Comments opposing the new rule were filed on August 18, 2004.

"more likely than not" (to be persecuted)). Section 1231(b)(2) is equally suited to judicial scrutiny.[14]

Cardoza-Fonseca and *St. Cyr* rest on the bedrock principle that it is this Court's province to "say what the law is." That power—and duty—have been unquestioned for over 200 years. *See* The Federalist No. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961) ("The interpretation of the laws is the proper and peculiar province of the courts."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (rejecting deference as contrary to the task "impose[d] upon the courts"). Here, of course, the courts of appeals are split as to what § 1231(b)(2) requires. Presumably, the Court granted the petition to resolve this conflict. *See* Sup. Ct. R. 10(a).

Yet just as the Court prepares to resolve the issue, respondent's proposed rule attempts to preclude it. Respondent downplays its intentions: it claims that it merely hopes to "eliminate any uncertainty regarding" its *own* interpretation. Resp. Br. 28 & n.11. But the proposed rule's language belies this disclaimer and seeks to settle the circuit split in its favor. *See* 69 Fed. Reg. 42,902 (July 19, 2004) (proposing to amend regulations "in response to this intercircuit conflict"); *id.* at 42,909 ("In light of a conflict among the United States courts of appeals * * * the Secretary of Homeland Security and the Attorney General publish this joint notice * * *.").

[14] The fact that this case arises on habeas review reinforces this point. *See INS v. St. Cyr*, 533 U.S. 289, 312 (2001) (calling habeas review "far narrower than judicial review"). Indeed, *St. Cyr*'s holding that the Court had habeas jurisdiction in spite of Congress' attempt to preclude "judicial review" depends on the fact that habeas cases present questions of law that courts were created to decide.

B. The *Chevron* Doctrine Is Plainly Inapplicable.

This Court has devised a two-step inquiry to determine whether deference is warranted: (1) whether Congress has spoken to the question at issue; and (2) if the statute is ambiguous about that issue, whether the agency's construction is reasonable. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). In other words, "[i]f a court, *employing traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9 (emphasis added). The sequence is critical: the Court must first attempt to construe the statute using conventional methods.

Petitioner and respondent agree that Congress' intent can be ascertained from the text of § 1231(b)(2), although there is of course a dispute about the result. *Compare* Pet. Br. 17-31 *with* Resp. Br. 16-26. Unlike *Chevron*, the issue here does not concern the meaning of a technical term but the relationship of subsections of a statute—a pure question of law. *See Cardoza-Fonseca*, 480 U.S. at 445-47 & n.30 (rejecting *Chevron* deference because Congress' intent was ascertainable by standard methods of construction); *see also St. Cyr*, 533 U.S. 320 n.45 (applying first "normal" tools of construction).[15] And there is no suggestion here that petitioner is trying here to relitigate an issue previously lost in an administrative "agency * * * but [that] was never waged in Congress." *Chevron*, 467 U.S. at 864. Unlike the EPA's guidance in *Chevron*, respondent's proposed rule cannot resolve petitioner's question of law.

[15] Respondent also cites *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999) in support of deference. Resp. Br. 28. Like *Chevron*, that case involved a technical term. *See id* at 423-24 (considering definition of specialized statutory phrase "serious nonpolitical crime"). *Aguirre-Aguirre*'s holding (like *Chevron*'s) is nowhere near as broad as respondent suggests. *See Yu v. Brown*, 92 F. Supp. 2d 1236, 1242 (D.N.M. 2000) (limiting *Aguirre-Aguirre* to definition of "specific statutory term").

Chevron deference also is inappropriate because respondent has overstepped Congress' delegation of authority. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"). Respondent's proposed rule commandeers Congress' general delegation, *see* 8 U.S.C. § 1103(a)(1), and completely re-writes the statute. Respondent unmistakably and improperly wields its proposed regulation "to regulate the scope of the judicial power." *Adams Fruit*, 494 U.S. at 650.

C. Respondent's Proposed Rule Conflicts With Its Past Interpretations.

The weight of respondent's proposed rule "will depend upon the thoroughness evident in [its] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Skidmore*, 323 U.S. at 140. Here, respondent unconvincingly seeks to jettison its interpretive history.

This Court's precedent bars deference to respondent's newfound litigation position. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer because the administrative interpretation was "contrary to the narrow view * * * advocated in past cases"); *see also Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (rejecting "appellate counsel's *post hoc* rationalizations for agency action").

Respondent's proposed rule conclusively demonstrates its true intent to escape its own previous, authoritative interpretations. *See* 69 Fed. Reg. at 42,908 ("[a]s *Linnas* [19 I. & N. Dec. 302 (BIA 1985)] * * * fail[s] to consider the statutory requirements, the extant legislative policies, long-standing administrative practice, or the foreign relation implications of these provisions, *the Attorney General departs from* Linnas") (emphasis added). BIA decisions such as *Linnas* indisputably constitute binding agency

interpretations of the acceptance requirement. *See Cardoza-Fonseca*, 480 U.S. at 446 n.30. The proposed rule's omission of the decision in *In re Anunciacion*, 12 I. & N. Dec. 815 (BIA 1968), only highlights respondent's reversal, as that case clearly discussed an acceptance requirement. *See id.* at 818.

Nor do adjudicative pronouncements provide the only glimpse of respondent's consistent past interpretation: its current rules repeatedly invoke an acceptance requirement. *See* 8 C.F.R. §§ 241.4(k)(1), 241.5(c)(1), 241.13(f); *see also* Feb. 2003 Mem. Op., *quoted in* Pet. Br. 36-37. Not coincidentally, respondent proposes to remove each of these references to "acceptance." *See* 69 Fed. Reg. at 42,910.[16]

For these reasons, *Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735 (1996), cannot salvage respondent's argument. *See id.* at 744 n.3 (if "court is addressing transactions that occurred *at a time when there was no clear agency guidance*, it would be absurd to ignore the agency's current authoritative pronouncement") (emphasis added) & 742 (deferring because no "change of official agency position ha[d] occurred"); *see also Pauly v. United States Dep't of Agric.*, 348 F.3d 1143, 1152 (9th Cir. 2003) (holding *Smiley* does not apply to position "represent[ing] an explicit break with prior practice"). Respondent's previous guidance is more than sufficient to foreclose reliance on *Smiley*. At all events, respondent's vested interest in the outcome here sharply contrasts with the agency's non-party position in that case. *Cf. Old Ben Coal Co. v. Dir., Office of Workers' Comp. Programs*, 292 F.3d 533, 541 n.7 (7th Cir. 2002) (comparing *Bowen* to deference claim by "agency [that] ha[s] a less-vested interest in the outcome").

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[16] The proposed rule also amends existing regulations to "clarify" that a "country" does not require a "government." 42 Fed. Reg. at 42,910-11.

Several other factors weigh against deference as well. First is the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449. Second, as a proposed rule respondent's novel construction is not yet effective. *See Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000).

Third, the proposed rule misconceives the nature of the issue. *See* 69 Fed. Reg. at 42,908 ("the sum of these cases lies in the [undefined] statutory term[ ] of 'accept'"); *see also* Resp. Br. 31 n.12. On the contrary, the definition of "accept" would only be relevant if there were some question about whether Somalia actually had manifested acceptance (i.e., whether oral, written, consular, or some other form). Plainly, the definition of the term is wholly unrelated to *whether* § 1231(b)(2) requires some form of governmental acceptance.

Fourth, respondent's proposed rule improperly blurs the distinction between rule-making and adjudication. *See Bowen*, 488 U.S. at 209 (permitting retroactive adjudication but not rule-making); *id.* at 216-18 (characterizing "rule" as something having "future effect") (Scalia, J., concurring). Though not strictly "retroactive," *see Landgraf v. USI Film Prods., Inc.*, 511 U.S. 244, 268-70 (1994), respondent's attempt to resolve its own pending litigation by administrative about-face smacks of unfairness. Finally, respondent's interpretation is objectively unreasonable for the various reasons discussed above.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 03-674

In the

Supreme Court of the United States

Keyse G. Jama,
Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF YUSUF ALI ALI, MOHAMED AWEYS, MOHAMED HUSSEIN HUNDIYE, GAMA KALIF MOHAMUD, AND THE CLASS OF INDIVIDUALS THAT THEY REPRESENT AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, and Gama Kalif Mohamud were each ordered removed to Somalia on various dates in 2000 and 2001. However, because there was "no significant likelihood of [their] removal [to Somalia] in the reasonably foreseeable future," *Zadvydas v. Davis*, 533 U.S. 678, 681 (2001), they were released from detention pursuant to orders of supervision. Somalia "has been without a central government" and in "a state of general chaos" since 1991, *Ali v. Ashcroft*, 213 F.R.D. 390, 396 (W.D. Wash.), *aff'd*, 346 F.3d 873 (9th Cir. 2003). Although no material change occurred in Somalia, and thus Somalia remained unable to accept them, in late 2002, each was told that their removal to Somalia was imminent.

On the eve of their planned departure for Somalia, Messrs. Ali, Aweys, Hundiye, and Mohamud filed a joint habeas petition with the District Court for the Western District of Washington, seeking to prevent their removal to Somalia unless and until Somalia accepted them. The district court granted an emergency stay of removal.

Counsel for these individuals then began hearing reports of other individuals at risk of imminent removal to Somalia. When efforts to obtain information concerning the identities and locations of these individuals failed, the habeas petition was amended to seek class action relief on behalf of all individuals subject to final orders of removal to Somalia. The district court granted an emergency stay of removal for all prospective class members.

Following a hearing, the district court granted the habeas petition on behalf of Messrs. Ali, Aweys, Hundiye, Mohamud, and the class of individuals for which it determined they were proper and adequate class representatives. The district court *sua sponte* excluded from the class the petitioner in the case before the Court—Keyse

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[1] No counsel for a party authored this brief in whole or in part. No person, entity, or organization other than Amici Curiae and their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent for the filing of this brief have been filed with the Clerk of the Court.

Jama—and the several other individuals who had already filed individual habeas petitions challenging the Government's ability to remove them to Somalia without Somalia's acceptance. The district court enjoined the removal of all members of the class to Somalia until Somalia accepts them, *Ali*, 213 F.R.D. at 396, and the Ninth Circuit affirmed, *Ali v. Ashcroft*, 346 F.3d 873, 877 (9th Cir. 2003). The Government's petition for rehearing *en banc*, filed in December 2003, is pending at the Ninth Circuit.

INTRODUCTION

One of the central themes that the Government presented in opposition to the Petition in this case is that the Eighth Circuit "correctly concluded that 'there exist[ed] no settled judicial construction' of former Section 1253(a) that required acceptance of the alien by the foreign government in all circumstances." Br. for Resp. in Opp. at 11 (quoting Pet. App. 7a). In fact, the judiciary, the executive branch, and the legislative branch uniformly have viewed acceptance as required.

This brief will set out in detail the history of the acceptance requirement, before proceeding to discuss recent proceedings relating to the Government's efforts to remove aliens to Somalia in the face of this history. This brief will then conclude with a short argument section in which it explains some of the ways in which the Eighth Circuit's reasoning is flawed and should be rejected by the Court.

STATEMENT OF THE CASE

A. THE HISTORY OF THE ACCEPTANCE REQUIREMENT

1. The Immigration Act of 1917

For most of the first half of the 20th century, the countries to which aliens could be removed was controlled by § 20 of the Immigration Act of 1917, ch. 29, 39 Stat. 874 (the "1917 Act"). This provision stated:

> That the deportion of aliens provided for in this Act, shall, at the option of the Secretary of Labor, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

Under the 1917 Act, the Government was thus limited to three possibilities for deporting an alien. Depending on the circumstances, it could send the alien back to the country from which he or she came to the United States or of which he or she was (1) a subject or citizen or (2) a resident prior to coming to the United States.

Section 20 of the 1917 Act only addresses the issue of acceptance expressly for the situation where an alien arrived in the United States from a country of which the alien was not a subject or citizen. Nevertheless, it was widely understood that acceptance from the country to which an alien was to be removed was required in all instances. In *United States ex rel. Hudak v. Uhl*, 20 F. Supp. 928, 929 (N.D.N.Y. 1937), *aff'd*, 96 F.2d 1023 (2d Cir. 1938), for example, the court held:

> It will be presumed in every case of deportation that the United States immigration authorities have obtained the consent of the native sovereignty to receive the deported alien.

Executive branch officials came to the same conclusion. For instance, in a 1949 letter to the Judiciary Committee, Attorney General Tom C. Clark observed that "many aliens . . . cannot be returned to the country of their nationality because of a passport refusal by their own government." *Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 4 (1949). *See also id.* at 6

(INS Commissioner, Watson B. Miller, discussing the fact that many aliens could not be deported because of the refusal of foreign governments to accept them).

2. The Internal Security Act of 1950

In the aftermath of World War II, Congress evaluated potential amendments to the immigration laws to deal with various national security issues, with a particular emphasis on potential Communist subversives. Congress enacted the Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (the "1950 Act"), to deal with many of these issues. For instance, this legislation made present or former membership in the Communist Party a ground for inadmissibility. 1950 Act, § 22.

The 1950 Act also gave the Attorney General additional authority with respect to the countries to which aliens could be removed. Section 20 of the 1917 Act was amended to read as follows:

> That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States; or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States; or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any country of which such an alien is a subject, national, or citizen; to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or

> impossible, then to any country which is willing to accept such alien into its territory. . . .

1950 Act, § 23. For the first time, the Attorney General was authorized to select among the allowable countries of removal, without any order of priority, if the country selected by the alien for deportation did not accept the alien. Moreover, the 1950 Act expanded the list of countries to which an alien could be deported. In addition to returning the alien to the country from which he or she had come, was a subject or citizen, or was a resident, the 1950 Act authorized the Attorney General to deport an alien elsewhere, including to his country of birth or, ultimately, to any country that would agree to accept him or her.

The legislative history of § 23 of the 1950 Act confirms that Congress expected the Attorney General to obtain acceptance from the country where an alien is to be removed. Indeed, the history shows there was considerable concern with the problems associated with the need to get acceptance, yet the solutions considered did not include eliminating the requirement.[2]

First, the history confirms the widely held understanding that acceptance was required from the receiving country. This is reflected, *inter alia*, by the considerable concern and frustration about the effect of the rule. For instance:

- In criticizing the Hobbs Bill for providing overzealous surveillance of deportable aliens and confinement without judicial trial, Congressman Arthur Klein nonetheless recognized its attempt to deal with the growing problem of undeportables: "more than 1,300 undesirable and deportable aliens are running about loose in the United States. The immigration laws say that they must be deported, and the countries to which they might be deported say they will not take these

---

[2] The text of § 23 of the 1950 Act was derived from a bill introduced by Congressman Sam Hobbs, and referred to as either the "Hobbs Bill" or "H.R. 10." Thus, much of the legislative history discussed in this brief is in the context of the Hobbs Bill. The history includes reports of the committees charged with examining immigration policy issues, as well as the statements of individual legislators during floor debates.

undesirable people." 97 CONG. REC. A5229 (1950).

- Similarly, Congressman Williams Bolton remarked, "I understand that there are outstanding nearly 3,000 orders for deportation of these people and by refusal of their native country to take them back or by their own refusal to obtain necessary travel documents, they are today enjoying the freedom of the United States." 97 CONG. REC. A5270 (1950).
- The Senate Committee on the Judiciary explained that "[o]ne of the most serious problems with which the Immigration and Naturalization Service is faced is the disposition of aliens found deportable by the Service but who cannot be deported." *Report of the Comm. of the Judiciary,* S. Res. 137, 81st Cong., 2d Sess. 637 (1950) (80th Cong., 1st Sess., as amended).
- Senator Patrick McCarran noted during the presentation of the Senate version of the Hobbs Bill, "Under the present laws, there are literally thousands of cases of aliens who have been found to be deportable but who cannot be deported because of certain technicalities in the law. . . . [U]nder the present law the Government of the United States is powerless to execute its orders of deportation, and the aliens are free to roam the country at will." 97 CONG. REC. 14173 (1950).
- Congressman Klein read into the floor record a *Washington Post* editorial critiquing the passage of the Hobbs Bill which described the United States as being "'at the mercy of communistic agents'" whose regimes refuse to take them back once they enter the United States. 97 CONG. REC. A5231 (1950).

Throughout this legislative history, however, there is no mention of eliminating the acceptance requirement. Rather, the issue of so-called "undeportables" was dealt with by increasing the number of countries from which acceptance could be sought and by giving the Attorney General

additional powers to help obtain acceptance. For instance, the Attorney General was given the ability to apply pressure on other countries to provide acceptance, through reciprocal action against countries that did not grant acceptance. 1950 Act, § 22(7). The Attorney General also was given increased authority to detain aliens pending removal. 1950 Act, § 23. And an alien subject to an order of deportation could be convicted of a felony if he "shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." *Id.*

With respect to reciprocity, Senator McCarran explained, "This provision would enable the Attorney General to curtail immigration from those countries that refuse to accept back deportable aliens who were admitted to the United States upon the basis of documents issued by such countries." 97 CONG. REC. 14180 (1950).

With respect to detention, the Hobbs Bill was criticized for granting unfettered authority to the Attorney General to supervise and detain aliens pending their deportation. Central to the constitutional challenges to this measure was that the detention would be indefinite and not tied to the charging of a particular crime. The Hobbs Bill's promoters countered that the object of the detention was not to indefinitely keep the aliens in the United States or punish them, but rather to speed up their deportation by influencing the alien or the country from which he or she came to cooperate with the deportation process.

- In support of the Hobbs Bill, Senator Harry Cain explained that "[a]s the situation stands today, the Communist world can keep its agents in this country at will, because they know we will permit them to roam around and engage in their activities without restraint. I am convinced however, that should we serve notice that deportable subversives will be confined if their countries of origin will not accept them, the Communist world will be happy to take them back." 97 CONG. REC. 7220 (1950).
- In discussing Harry Bridges, a recognized member of the Communist Party living in the United States, Representative Hobbs noted that Bridges, along with 1,000 other aliens, had

come to the United States in "one of three easy ways—able seaman's enlistment, jumping ship in our ports, and getting travel documents which means coming through the United States." He went on to state that these aliens could easily find their way out by these means as well. In support of his bill he explained: "I am not interested in keeping [Bridges] locked up. I want him to get out. If his own country says he is such a bad citizen that they will not have him back, then I do not know of a better atmosphere to cool his fevered brow until he gets the inclination to ship again as an able seaman. That is the way he came in. He can go back that way, anywhere he wants to, and jump ship without any fear of being bothered." 97 CONG. REC. 10675-676 (1950).

- An attorney for the Jewish War Veterans of the United States testified as to his belief that deporting aliens to any country possible, regardless of where the alien was born or whether he was a resident or national of the country, could not lawfully be implemented because "[o]ur government cannot under law deport any alien to any country unless that 'country is willing to authorize the reception of such alien." Representative Michael Feighan then interrupted him to make clear that "it is contemplated that only countries who would be willing to receive such aliens would receive them" under the bill. *Deportation and Detention of Aliens: Hearings on H.R. 10 Before the Subcomm. No. 1 of the House Comm. on the Judiciary*, 81st Cong., 1st Sess. 6 (1949).

3. The Court's Decision in *United States v. Spector*

During its October 1951 Term, the Court considered a challenge to the portion of the 1950 Act that made it a felony for an alien subject to an order of removal to "willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure." *United States v. Spector*, 343 U.S. 169, 170 (1952) (quotation marks, citation and emphasis omitted). The district court had dismissed criminal charges against Spector on the basis that the statute "was unconstitutionally vague and indefinite, because it did not specify the nature of the travel documents necessary for departure nor indicate to which country or to how many countries the alien should make application." *Id.* at 171. The Court reversed the district court, concluding that the statute was clear "when viewed in its statutory setting." *Id.* The Court's analysis discussed the necessity of getting the receiving country's acceptance:

> The statutory scheme seems clear and unambiguous. The choice of a country willing to receive the alien is left first to the alien himself and then to the Attorney General. ***Once the country willing to receive the alien is identified***, the mechanism for effecting his departure remains.

Id. (emphasis added).

Justice Jackson, in dissent, discussed the purpose behind criminalizing the failure to cooperate in obtaining travel documents:

> Experience in the Executive Department with the immigration laws made me aware of a serious weakness in the deportation program which Congress by this Act was trying to overcome. ***A deportation policy can be successful only to the extent that some other state is willing to receive those we expel***. But, except selected individuals who can do us more harm abroad than here, what Communist power will cooperate with our deportation policy by receiving our expelled Communist aliens? And what non-Communist power feels such confidence in its own domestic security that it can risk taking in persons this stable and powerful Republic finds dangerous to its security? World conditions seem to frustrate the policy of deportation of subversives. Once they gain admission here, they are our problem and one that cannot be shipped off to some other part of the world.

> While we would not join in a strained construction of the Constitution to create captious or trivial obstacles or delays to solution of this problem, we cannot sanction sending aliens to prison except upon compliance with constitutional procedures. We can afford no liberties with liberty itself.

Id. at 179-80 (Jackson, J., dissenting) (emphasis added).

4. The Immigration and Nationality Act of 1952

Through the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163 (the "INA"), Congress sought to bring all of the country's immigration and naturalization laws under one comprehensive statute. S. Rep. No. 82-1137 at 1-2 (1952). In the process, § 20(a) of the 1917 Act as amended by the 1950 Act was incorporated into the INA at § 243(a). The language was modified to read as follows:

> The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be

> directed to any country of which such alien is a subject national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—
>
> (1) to the country from which such alien last entered the United States;
>
> (2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;
>
> (3) to the country in which he was born;
>
> (4) to the country in which the place of his birth is situated at the time he is ordered deported;
>
> (5) to any country in which he resided prior to entering the country from which he entered the United States;
>
> (6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or
>
> (7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

INA, § 243(a).

5. Judicial and Administrative Interpretations of Section 243(a) of the INA

(a) Federal Court Decisions

Soon after passage of the INA, the federal courts faced a series of cases evaluating the Attorney General's authority under § 243(a). In each of these cases, the courts concluded that the statute required acceptance in all circumstances.

In 1953, the District Court for the Southern District of New York was presented with a habeas petition by an alien who contended that

> the Attorney General has had a reasonable time following entry of the final order—almost five months—to effect his deportation, and since it now affirmatively appears that it is well nigh impossible to deport him to any country within the six-month period referred to in § 242(c), or in a considerably longer period, there is no basis for his continued detention as an incident of deportation.

United States ex rel. Kusman v. Dist. Dir. of Immigration & Naturalization at Port of N.Y., 117 F. Supp. 541, 543 (S.D.N.Y. 1953). The court concluded that the six-month detention period was a maximum, and that it did not mean an alien could not seek release from detention earlier when there was a showing that removal would not occur before six months passed. *Id.* at 545. As a result, the court needed to determine if the habeas petitioner had met his burden of proving that his removal was not likely to occur soon. In this context, the court observed that the removal statute, in all instances, requires acceptance from the receiving country:

> It is necessary to consider the statutory scheme designed to expedite the deportation of aliens. The alien is given the privilege to designate the country to which he desires deportation. He is limited to a single choice. If the designated country is unwilling to accept him, the Attorney General is directed to deport him first to the country of which he is a "subject, national or citizen," or failing that, to send him to a series of specified countries, including that (a) from

> which he last entered into or embarked for the United States, (b) of his birth, (c) in which is now contained the place of his birth. ***But if none of the designated places will have him***, or deportation there is "impracticable, inadvisable or impossible", then the Attorney General is empowered to deport to any country—except one contiguous to the United States—which will accept him.

Id. at 545-56 (emphasis added). *See also United States ex rel. Lee Ming Hon v. Shaughnessy*, 142 F. Supp. 468 (S.D.N.Y. 1956); *United States ex rel. Tom Man v. Shaughnessy*, 142 F. Supp. 444 (S.D.N.Y. 1956), *aff'd*, 264 F.2d 926 (2d Cir. 1959).

In 1954, the Second Circuit addressed several of the provisions of the third step of § 243(a), including that relating to place of birth, in the context of mainland China. *United States ex rel. Leong Choy Moon v. Shaughnessy*, 218 F.2d 316 (2d Cir. 1954). In *Moon*, Judge John Harlan observed that deportation could only occur to China as the place of the aliens' birth, "of course, [if it] turns out that the Chinese communist authorities are willing to accept this alien." *Id.* at 319.

In 1959, the Second Circuit addressed the Attorney General's removal authority even more directly in *United States ex rel. Tom Man v. Murff*, 264 F.2d 926 (2d Cir. 1959). In *Tom Man*, Judge Learned Hand definitively concluded:

> There remains therefore one or more of the seven subdivisions of § 243(a) [previously codified at 8 U.S.C. § 1253(a)] of which number three [the country in which he was born] certainly covers him and probably several others. ***However, we think that deportation under any of these is subject to the condition expressed in the seventh subdivision: i.e. that the "country" shall be "willing to accept" him "into its territory."***

Id. at 928 (emphasis added). "We cannot see any reason to suppose that the necessary consent in such situations should not follow the pattern laid down earlier in the section . . . ." *Id. See also Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960).

Over the next few years, the Ninth Circuit and the D.C. Circuit followed the lead of the Second Circuit. *See Chi Sheng Liu v. Holton*, 297 F.2d 740, 743-44 (9th Cir. 1961) (following the Second Circuit decision in *Tom Man*); *Lee Wei Fang v. Kennedy*, 317 F.2d 180, 183 (D.C. Cir. 1963) ("[W]here the aliens were not acceptable to or accepted by the [Chinese] Nationalist Government under the second 'priority' of the statute, deportation could be made only to a country willing to accept them, after inquiry, under the third part of the statute.").

The First Circuit expressed its agreement two decades later in *Amanullah & Wahidullah v. Cobb*, 862 F.2d 362 (1st Cir. 1988), *vacated*, 872 F.2d 11 (1st Cir. 1989). In *Cobb*, each member of the three-judge panel wrote an opinion, because they could not agree whether 8 U.S.C. § 1227(a)(2), the "parallel provision" for excludable aliens, required "prior inquiry to and assurance from a country that it is willing to accept the excludable alien before that alien may be deported to that country." *Id.* at 365.[3] In their individual opinions, however, all three members of the panel agreed that § 243(a) required acceptance prior to removal of a deportable alien. *See id.* at 365, 368, 370-71.

(b) Board of Immigration Appeals Decisions

In the meantime, the Board of Immigration Appeals (the "Board") also addressed the need for acceptance from the country to which an alien was to be removed. In 1968, in the case of an alien ordered removed to the country of which she was a national or citizen as well as where she was born, the Board concluded that "obviously, the United States cannot deport an alien to a country which will not accept her." *Matter of Anunciacion*, No. A-14438768, 12 I. & N. Dec. 815, 817, 1968 WL 14118 (BIA July 25, 1968). The Board stated this conclusion in the context of holding that acceptance of the country to which an alien is ordered removed need not be determined when removal is ordered to

[3] Senior Judge Pettine believed acceptance was required, *id.* at 365 n.4; Judge Aldrich believed it was not, *id.* at 369-70; and Judge Coffin declined to decide the issue, but nonetheless observed "that it is sheer folly to send an alien to another country without any indication that the country will not receive the alien," *id.* at 368.

that country, but instead is to be determined "after the order of deportation has become final." *Id.*

Likewise, in *Matter of Linnas*, No. A-8085626, 19 I. & N. Dec. 302, 307, 1985 WL 56051 (BIA Oct. 16, 1985), the Board, citing both the statute and *Tom Man*, stated that step three of the country of removal process requires the acceptance of the receiving government in *all* situations: "the 'government' . . . under any of the three steps must indicate it is willing to accept a deported alien into its 'territory.'"[4]

The Government argues that the Board's decision in *Matter of Niesel*, No. A-12281979, 10 I. & N. Dec. 57, 1962 WL 12904 (BIA Aug. 10, 1962), is contrary to *Linnas*. However, *Niesel* did not raise the issue whether acceptance by the country of removal was required in the ***execution*** of a deportation order or whether removal could occur without properly issued travel documents. Rather, in that case, the alien argued that the INS must obtain the agreement of the country of removal before deportation can be ***ordered*** to that country.

> Counsel contends, moreover, that under judicial construction of the Act, ***before deportation to a country can be ordered***, the Service must make a showing that the proposed country has agreed to accept the alien. *Lu v. Rogers*, 164 F. Supp. 320 (D.D.C. 1958), is cited. When ***designating*** a country in step three as a place of deportation, there is no requirement that ***preliminary inquiry*** be addressed to the country to which deportation is ***ordered*** . . . .

10 I. & N. Dec. at 59 (emphasis added).[5]

[4] The Government has argued that *Linnas* does not express a nationwide view, but was compelled by the Second Circuit result in *Tom Man*. However, as discussed in the previous section of this brief, at the time *Linnas* was decided (indeed, until the Eighth Circuit's decision in the present case), every court, including the several circuits, that had evaluated the question had reached the same result. Moreover, the Board did not state in *Linnas* that it disagreed with *Tom Man* but felt it was compelled to follow the Second Circuit's decision.

[5] In neither *Anunciacion* nor *Linnas* did the Board even suggest its prior decision in *Niesel* was contrary to the result in those cases.

6. The Illegal Immigration Reform and Immigrant Responsibility Act

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (the "IIRIRA"). Through the IIRIRA, § 243(a) was recodified at 8 U.S.C. § 1231(b)(2). The statute remains substantively identical, but now reads:

> **(2) Other aliens.** Subject to paragraph (3) –
>
> (A) **Selection of country by alien**. Except as otherwise provided in this paragraph –
>
> (i) any alien not described in paragraph (1) who has been ordered removed may designate one country to which the alien wants to be removed, and
>
> (ii) the Attorney General shall remove the alien to the country the alien so designates.
>
> * * *
>
> (C) **Disregarding designation.** The Attorney General may disregard a designation under subparagraph (A)(i) if –
>
> (i) the alien fails to designate a country promptly;
>
> (ii) the government of the country does not inform the Attorney General finally, within 30 days after the date the Attorney General first inquires, whether the government will accept the alien into the country;
>
> (iii) the government of the country is not willing to accept the alien into the country; or
>
> (iv) the Attorney General decides that removing the alien to the country is prejudicial to the United States.

> (D) **Alternative country**. If an alien is not removed to a country designated under subparagraph (A)(i), the Attorney General shall remove the alien to a country of which the alien is a subject, national, or citizen unless the government of the country –
>
> (i) does not inform the Attorney General or the alien finally, within 30 days after the date the Attorney General first inquires or within another period of time the Attorney General decides is reasonable, whether the government will accept the alien into the country; or
>
> (ii) is not willing to accept the alien into the country.
>
> (E) **Additional removal countries**. If an alien is not removed to a country under the previous subparagraphs of this paragraph, the Attorney General shall remove the alien to any of the following countries:
>
> (i) The country from which the alien was admitted to the United States;
>
> (ii) The country in which is located the foreign port from which the alien left for the United States or for a foreign territory contiguous to the United States;
>
> (iii) A country in which the alien resided before the alien entered the country from which the alien entered the United States;
>
> (iv) The country in which the alien was born;
>
> (v) The country that had sovereignty over the alien's birthplace when the alien was born;

(vi) The country in which the alien's birthplace is located when the alien is ordered removed;

(vii) If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, another country whose government will accept the alien into that country.

8 U.S.C. § 1231(b)(2).

Congressional committee reports related to the IIRIRA confirm that the modifications to the wording between § 243(a) of the INA and 8 U.S.C. § 1231(b)(2) were not intended to be substantive. In particular, a major report on immigration issues by the Judiciary Committee of the House of Representatives stated as follows with respect to § 1231(b)(2), "Section 241(b) establishes the countries to which an alien may be removed. . . . [S]ubsection (b)(2) ***restates*** the provisions in current sections 243 (a) and (b) [8 U.S.C. § 1253(a)]." H.R. Rep. No. 104-469, at 234 (1996) (emphasis added). *See also* H.R. Rep. No. 104-828, at 216 (1996) (repeating that the intent was simply to "restate" the prior provisions).

7. INS Regulations and Operations Instructions

Regulations governing the detention, removal, and release process state that the designated country of removal must accept the alien to effectuate removal. *See* 8 C.F.R. § 241.4(k)(1) (INS officials shall review the custody of certain aliens "where the alien's removal, while proper, cannot be accomplished during the period because no country currently will accept the alien"); 8 C.F.R. § 241.13(d)(1) (an alien may show there is no likelihood of removal in the foreseeable future to the designated country and "no third country willing to accept the alien"); 8 C.F.R. § 241.13(f) (Headquarters Post-Order Detention Unit shall consider factors including "the receiving country's willingness to accept the alien into its territory" in determining whether there is a likelihood of the alien being removed in the foreseeable future); 8 C.F.R. § 241.5(c) (governing

conditions of release after the removal period and stating that an officer may "grant employment authorization to an alien released under an order of supervision if the officer specifically finds that [t]he alien cannot be removed because no country will accept the alien").

Similarly, regulations governing detention of aliens beyond the removal period show that travel documents are an essential part of removing an alien. Under 8 C.F.R. § 241.4(g)(3), INS officials "***shall*** consider the ability to obtain a travel document for the alien" in making a custody determination. (Emphasis added.) INS officials must continue to pursue travel documents both during the removal period and after the removal period expires. 8 C.F.R. § 241.4(g)(2). Similarly, INS Operations Instruction 243.1(c)(1) makes clear that "deportation cannot be effected until travel documentation has been obtained."

Finally, it is important to note that the Government issued every one of the foregoing regulations and operations instructions ***after*** the enactment of the IIRIRA in 1996. That is, prior to and even after (as explained below) its recent efforts to remove individuals to Somalia, the Government itself has consistently interpreted 8 U.S.C. § 1231(b)(2) to require the receiving country's acceptance prior to removal.

B. THE EXECUTIVE'S RECENT EFFORTS TO DEPORT ALIENS WITHOUT ACCEPTANCE

In 2000 and 2001, the Government ordered amici Yusuf Ali Ali, Mohamed Aweys, Mohamed Hussein Hundiye, and Gama Kalif Mohamud deported to Somalia. Because there was "no significant likelihood of [their] removal [to Somalia] in the reasonably foreseeable future," *Zadvydas*, 533 U.S. at 681, they were released from detention pursuant to orders of supervision.[6]

Following the terrorist attacks of September 11, 2001, the Government stepped up efforts to deport aliens from countries suspected of having terrorist connections. As part of this effort, the Government began organizing to remove groups of aliens to Somalia by privately chartered aircraft.

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[6] Mr. Mohamud was later re-detained in June 2002 for alleged violations of his conditions of release.

See Excerpts of Record filed with Ninth Circuit in *Ali v. Ashcroft*, Ninth Circuit No. 03-35096 (hereinafter "*Ali* ER"), F3; Supplemental Excerpts of Record filed with Ninth Circuit in *Ali v. Ashcroft*, Ninth Circuit No. 03-35096 (hereinafter "*Ali* SER"), 175-79. *See also Ali*, 213 F.R.D. at 396 (discussing Government's shift in deportation policy after September 11, 2001).[7] The first (and the last) such charter-flight removal occurred in February 2002 and resulted in the removal of 24 Somalis to a "transiting" country from which they were supposed to be removed by the charter company to Somalia. *Ali* ER Tab F3.

Two weeks prior to this chartered flight, Magistrate Judge Boylan ruled that the planned removal of Keyse Jama to Somalia violated § 1231(b)(2) because the Government had not, and could not, obtain the consent of Somalia. *See* Pet. App. 34a-38a. District Court Judge Tunheim affirmed this result on March 31, 2002. Pet. App. 55a.

Notwithstanding the absence of a recognized Somali government and the Minnesota District Court's determination that, under this circumstance, § 1231(b)(2) bars removal to Somalia, the Government continued its efforts to remove aliens to Somalia. In the fall of 2002, it began organizing another private charter flight for the removal of more individuals to Somalia. Five aliens in the Seattle, Washington area—Messrs. Ali, Aweys, Hundiye, and Mohamud, as well as Ahmad Noor Yusuf—were selected to be part of this removal operation.

On Friday, November 8, 2002, Messrs. Ali, Aweys, Hundiye, and Yusuf were served with letters revoking their orders of supervision and notifying them that plans were underway for their "imminent" removal to Somalia. *Ali* ER Tab D. With the exception of Mr. Mohamud, these

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[7] Somalia has been, since 1991, "a country in chaos, engaged in clan warfare with rival groups clashing over turf and control, with no government and no diplomatic relations with the United States." *Ali*, 213 F.R.D. at 400. Although the Government has asserted that Somalia is linked with terrorism, the Government has presented no evidence of international terrorist activities in Somalia, *see id.* at 401, nor has the Government even alleged that Jama or amici are suspected terrorists. In any event, there is a separate statute for removal of suspected terrorists, which also requires acceptance of the receiving country. 8 U.S.C. § 1537(b)(2).

individuals had been free from detention under orders of supervision, but they were re-detained at this time.

Working under enormous time pressures and assisted by Mr. Jama's counsel, counsel in Seattle succeeded in gathering together and drafting the pleadings necessary to file a consolidated petition for habeas corpus with the United States District Court for the Western District of Washington on Wednesday, November 13, 2002, the day before these five individuals were to be flown out. Given the immediacy of the situation, counsel simultaneously filed on their clients' behalf an emergency motion for a temporary restraining order, and that same day, the Western Washington District Court enjoined the Government from removing the petitioners and set a briefing schedule to determine whether a preliminary injunction should issue. *See Ali*, 213 F.R.D. at 397.

Over the next week and a half, Seattle counsel learned that, despite the orders issued by the Minnesota District Court and the Western Washington District Court, the Government was continuing its attempts to remove a number of other individuals to Somalia. Seattle counsel and others scrambled, often with only hours to spare, to locate detained Somalis around the country (who often had been moved from one state to another) and then identify *pro bono* counsel that might be able to assist them. In late November and early December 2002, as a result of these efforts, the United States District Courts for the Eastern and Western Districts of Louisiana issued orders restraining the Government from removing to Somalia over a dozen other individuals. *See Ali*, 213 F.R.D. at 397.

The efforts of the various *pro bono* counsel around the country were complicated by the fact that Somalis were often being detained and then moved from state to state without notice to their families or anyone else outside the Government. In an effort to identify and locate persons at risk of removal to Somalia, on November 18, 2002, Seattle counsel submitted an expedited request to the Government under the Freedom of Information Act, 5 U.S.C. § 552. *Ali* SER 33-35. The Government did not provide the requested information. *See Ali* SER 23-24.

Faced with these circumstances, on November 26, 2002, petitioners amended their habeas petition to seek class relief.[8] *Ali*, 213 F.R.D. at 397. Counsel simultaneously requested that the Government halt all deportations to Somalia until a decision on the merits of the class action petition could be rendered. *Ali* SER 50-51. The Government did not respond to this request and, accordingly, on December 4, 2002, with a further removal of a group of individuals to Somalia by charter aircraft scheduled for early December 2002, counsel filed an emergency motion for a class-wide temporary restraining order against removals to Somalia. In a telephonic hearing on December 5, 2002, the district court judge requested that the Government refrain from conducting such removals until a decision on the merits of the class action habeas petition had been issued, but the Government refused. The district court, therefore, issued an oral decision temporarily enjoining all removals to Somalia, which was followed by a written order to the same effect on December 9, 2002. *Ali*, 213 F.R.D. at 397.

Oral argument on the motions for a preliminary injunction and for class certification was heard on January 14, 2003, and both motions were granted from the bench. *Id.* The district court, on its own initiative, excluded from the class all individuals who had, as of that date, already filed a habeas corpus petition raising the acceptance requirement issue, thereby not interfering with other pending matters or thwarting percolation of the issue at the lower courts. The district court issued a written opinion on January 17, 2003, making the preliminary injunction permanent and concluding, *inter alia*, that "[t]he class action vehicle is necessary to open the doors of the courthouse for a large number of Somalis ***whose identity and location the Government refuses to reveal***." *Id.* at 411 (emphasis added).

The Government appealed the decision to the Ninth Circuit. The Ninth Circuit agreed to the Government's unopposed request to consider the appeal on an expedited basis. The Ninth Circuit affirmed on September 17, 2003. *Ali*, 346 F.3d at 892. The Government filed a petition for

[8] At the same time, Mr. Yusuf was dropped from the habeas petition as the agency determined that he had a meritorious claim on a different issue. *See Ali* SER 50-51.

rehearing *en banc* on December 11, 2003, which petition currently is pending.

One of the Government's principal arguments before the district court was that "because there is no government to ***reject*** persons removed to the territory of Somalia, 'acceptance' has occurred. Put another way, Petitioners would be deemed 'accepted' unless they are 'barred from deplaning in Somalia or otherwise expelled from Somalia.'" *Ali*, 213 F.R.D. at 401 (quoting Government's Return and Response at 24). Before the Ninth Circuit, however, the Government abandoned this argument. Instead, it relied on its assertion that the "plain language" of § 1231(b)(2) permits the Government to remove an alien to Somalia without acceptance if Somalia is that person's country of birth. *Ali*, 346 F.3d at 881.

C. MEMORANDUM OF THE OFFICE OF LEGAL COUNSEL

Ironically, less than two weeks after the Government filed its notice of appeal to the Ninth Circuit and one week after oral argument to the Eighth Circuit in Mr. Jama's case, the Office of Legal Counsel (the "OLC") issued a memorandum that interprets § 1231(b)(2). Contrary to the Government's present "plain language" argument, the memorandum states that "***if none*** of the six listed countries [in 8 U.S.C. § 1231(b)(2)(E)(i)-(vi)] ***is willing to accept*** the alien," then the Attorney General must seek another country "whose government is willing to accept the alien." Memorandum Opinion for the Deputy Attorney General: Limitations on the Detention Authority of the Immigration and Naturalization Service at 13 n. 11 (Feb. 20, 2003) (emphasis added), *available at* <http:www.usdoj.gov/olc/INSDetention.htm>.

The Government made no mention of the memorandum in its briefing to the Ninth Circuit, and Seattle counsel did not become aware of it until December 2003, when they discovered it on the Department of Justice website. Upon discovering the memorandum, Seattle counsel sent a letter to the Solicitor General requesting that the Government either cease efforts to conduct removals to Somalia or at least explain how the Government's litigation position can be reconciled with the OLC's views. The Government did not

provide a direct response to this inquiry. Instead, the response came in a footnote in the Government's brief in opposition to the Petition in this case. *See* Br. for Resp. in Opp. at 12 n. 5.

The Government first dismissed the memorandum on the basis that § 1231(b)(2) "was not the subject of OLC's advice." *Id.* However, the OLC used its interpretation of § 1231(b)(2) to justify its other opinions in the memorandum. The Government also attempted to distance itself from the memorandum by arguing that it did "not consider the situation in this case, where the country of removal lacks a functioning government and acceptance therefore would be a practical impossibility." *Id.* However, the Government recently has asserted that its interpretation of § 1231(b)(2) allows a removal to Ethiopia, a country with a recognized central government, after Ethiopia failed to accept the alien. *See Abdulrahman v. Arrendale*, No. H-03-3849, Petition for Writ of Habeas Corpus (S.D. Tex., Sept. 10, 2003) *available at* <http://pacer.txs. uscourts.gov/> (recounting how the United States flew Abdulrahman to Ethiopia after the district court denied a prior habeas corpus petition (No. H-02-0743), despite Ethiopia's refusal to accept Abdulrahman, and returned Abdulrahman to detention in the United States when Ethiopia refused his entry).

SUMMARY OF ARGUMENT

The Government's position is contrary to an extensive history of legislative, judicial and administrative precedent. Its position also is contrary to the view set forth in the INS's own regulations and operations instructions, as well as the view expressed by the OLC.

Despite the fact that the current provision is virtually identical to the provision in place since the 1950s, the Government would have the Court ignore this history by suggesting that it was erased when Congress changed some of the statute's formatting in order to "restate" it under the IIRIRA in 1996. H.R. Rep. No. 104-469, at 234 (1996). *See* Br. for Resp. in Opp. at 12; *see also Ali*, 213 F.R.D at 403. The Government argues that the Eighth Circuit "correctly concluded that 'there exist[ed] no settled judicial construction' of former Section 1253(a) that required acceptance of the alien by the foreign government in all circumstances." Br. for Resp. in Opp. at 11 (quoting Pet.

App. 7a). This is simply incorrect. As demonstrated above, not only the courts, but the Board, the agency, and Congress uniformly understood that acceptance is a prerequisite to any removal.

Where the alien is a citizen or national of his country of birth, the Government's interpretation of the statute would allow the alien to be removed to that country pursuant to the third step in the statute when the same country previously refused to accept the alien pursuant to the second step of the statute. Where the alien is not a citizen or national of his country of birth, in the Government's view, the statute forces it to seek acceptance only of the country with a greater connection to the alien (country of citizenship) rather than the country with a more attenuated connection to the alien (country of birth). This turns the logic of the statute on its head. If the acceptance requirement were to be eliminated with respect to any countries, which it should not, it could only make sense to do so with respect to those countries with the greatest connection to the alien, not those with the least connection.

The Eighth Circuit struggled to explain away these absurd results, but its efforts do not withstand scrutiny.

ARGUMENT

Every court to examine the question until the Eighth Circuit decision below has concluded that the Attorney General may not remove an alien to a country that has not accepted the alien. The Board reached the same conclusion, as did the INS in passing regulations and adopting operations instructions.

Congress has acted in the face of this unanimous body of law to reaffirm, not alter, the status quo. Congress did not solve the issue of "undeportables" by eliminating the need for acceptance, but instead by expanding the number of places from which the Attorney General could seek acceptance, and giving the Attorney General other tools, including detention and the power to penalize countries not willing to accept aliens.

In the face of this long history, the Government has presented a variety of arguments. None has merit. One of the Government's initial principal arguments—that Somalia has granted acceptance when the United States finds a way to

deplane aliens within Somalia—has been abandoned. *See Ali*, 213 F.R.D. at 401. The fact that the Government made that argument at all suggests its lack of confidence in the position it continues to pursue, that acceptance is not required.

The Government also has posited that the statute must be interpreted not to require acceptance in the unique circumstances of Somalia, where there is no government from which acceptance can be sought. This argument fails for a variety of reasons. First, the Government has shown that it does not in fact recognize such a distinction by applying its no-acceptance-required position to a country that *does* have a government recognized by the United States, namely, Ethiopia. *See Abdulrahman v. Arrendale*, No. H-03-3849, Petition for Writ of Habeas Corpus (S.D. Tex., Sept. 10, 2003), *available at* <http://pacer.txs.uscourts.gov/>. Second, there is no language in the statute suggesting it should be interpreted differently for countries without recognized governments.[9] Third, the situation in Somalia is indistinguishable from that of the People's Republic of China at the time of *Tom Man*. Congress was aware that there were countries with governments that the United States did not recognize when it enacted the statute. Yet, Congress did not say anything about treating such situations differently when removing aliens.

The statute sets forth a logical progression from the country of greatest connection to the alien to the country of least connection to the alien. The Government's position ignores this progression. In doing so, the Government's view creates the potential for absurd results. It, therefore, must be rejected. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative

[9] If an argument were to be made that places without recognized governments are to be treated differently, it would have to be that such places do not even constitute "countries" as that term is used in the statute. *See, e.g., Chan Chuen v. Esperdy*, 285 F.2d 353, 354 (2d Cir. 1960) (a "country" to which an alien may be deported is "any place possessing a government with authority to accept an alien deported from the United States"); *Rogers v. Cheng Fu Sheng*, 280 F.2d 663, 664-65 (D.C. Cir. 1960) (suggesting that a "country" for removal purposes requires a functioning government with control of the historical geographic region). *See also* Pet. App. 11a-12a (Bye, J., dissenting).

interpretations consistent with the legislative purpose are available."). In particular, the Government's position allows for the removal of an alien to the country of his birth without acceptance under the third step of the statute when that same removal could not occur under the first or second steps of the statute. It, likewise, allows for the removal of an alien to a country with little connection to the alien to occur without acceptance, when, if anything, removal without acceptance makes more sense for a country with a greater connection to the alien.

The Eighth Circuit majority offered two reasons for avoiding this major flaw in the Government's position. Neither of these rationales withstands scrutiny.

First, to avoid the absurdity of Congress requiring the Attorney General to seek acceptance from the country of citizenship, but not requiring the Attorney General to seek acceptance from the country of birth, the Eighth Circuit points to the possibility that a person may not be "a subject, national or citizen of the country in which he was born." Pet. App. 7a. Although some aliens are subjects, nationals or citizens of a country other than where they were born, it is far more common that they are subjects, nationals or citizens of their country of birth. As a result, the Government's interpretation would allow it to avoid the acceptance requirement in the earlier step of the statute in the vast majority of situations. The potential for such abuse supports the conclusion that the statute requires acceptance under all steps of the process.[10] Moreover, the Eighth Circuit's proffered rationale ignores the argument that acceptance from the country of birth should be required under this scenario because the alien has virtually no connection to the country other than happening to have been born there. As stated above, if anything, one would expect acceptance to be more important the lesser the connection between the alien and the country.

The Eighth Circuit's second rationale—that "between countries, it is not uncommon behavior to attempt to accomplish a task by asking politely first, and then to act

[10] At a minimum, if this rationale allows the statute to be interpreted to allow removal to the country of birth without acceptance, it can only be for situations where the alien is not a citizen, national or resident of the country of birth.

anyway if the request is refused" (Pet. App. 7a)—is even weaker. The country of nationality or citizenship is not an option in the third step of the statute. This omission is fatal to the Eighth Circuit's reasoning. If Congress truly intended to have the Attorney General ask first and then act regardless of the answer, Congress would have allowed the Attorney General to send the alien to the country of citizenship, regardless of where born, in the third step if acceptance was refused in the second step. Likewise, if Congress was willing to have the Attorney General simply ask first and then act anyway, it could have simply said so. Put simply, there is no support for the proposition that Congress authorized the Attorney General to proceed in the unorthodox manner suggested by the Eighth Circuit.

CONCLUSION

For all the reasons stated above and the more expansive arguments set forth in the Petitioner's merits brief, amici urge the Court to reverse the judgment of the Eighth Circuit and confirm that acceptance is a prerequisite to any removal.

RESPECTFULLY
SUBMITTED

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KEYSE G. JAMA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICI CURIAE* OF INTERNATIONAL HUMAN RIGHTS ORGANIZATIONS AND INTERNATIONAL LAW PROFESSORS IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae submit this brief in support of petitioner. *Amici* are international human rights organizations and international law professors specializing in human rights law. Amnesty International USA is the U.S. arm of Amnesty International, a worldwide grassroots organization committed to promoting and defending human rights. The Center for Constitutional Rights is a non-profit legal organization dedicated to advancing and protecting the rights guaranteed by the Constitution of the United States and the Universal Declaration of Human Rights. Human Rights Watch is the largest U.S.-based international human rights organization and investigates and reports violations of fundamental human rights in over 70 countries worldwide with the goal of securing those rights for all individuals. The international law professors are: William J. Aceves (California Western School of Law); Deborah E. Anker (Harvard Law School); Douglass W. Cassel, Jr. (Northwestern University School of Law); Jenny S. Martinez (Stanford Law School); James J. Silk (Yale Law School); Beth Van Schaack (Santa Clara University School of Law); and David Weissbrodt (University of Minnesota Law School).[2] *Amici* are committed to promoting the recognition and enforcement of international human rights law and to focusing attention on its application to U.S. immigration law and policy.

SUMMARY OF ARGUMENT

When a country lacks a functioning central government, basic human rights cannot be enforced. Such is the current situation in Somalia. Since the outbreak of civil war in 1991, competing clans have battled for control of various parts of the country, and Somalia has come to resemble what Thomas Hobbes described over four centuries ago: a place of "continual

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[1] Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici*, or their counsel, has made a monetary contribution to its preparation or submission. Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court.

[2] Affiliations of *amici* international law professors are listed for identification purposes only.

fear, and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."[3]

Amici submit this brief in support of petitioner's claim that the United States may not presently deport him to Somalia. As the United States concedes, Somalia has no government that can accept petitioner's return. Until the court of appeals' decision below, *Jama v. INS*, 329 F.3d 630 (8th Cir. 2003), federal courts had uniformly construed the relevant removal statute, 8 U.S.C. § 1231(b)(2) (and its predecessor 8 U.S.C. § 1253(a)), to require that a foreign government accept an alien as a condition precedent to his deportation. The Solicitor General, however, contends that this statute imposes no impediment to petitioner's return to Somalia when there is no government to accept him, even though news reports describe "people being killed at the very airport where the INS [had sought] to drop [him]."[4] In the respondent's view, a statutory acceptance requirement serves no purpose unless there is another government "that would be offended by our [government's] return of an alien . . . without consent."[5]

The United States' commitment to protecting human rights and obligations under international law support a different conclusion, and, for the reasons summarized below, this Court should construe § 1231(b)(2) to prohibit petitioner's return to Somalia under the current circumstances.

1. On the threshold issue of jurisdiction, the court of appeals correctly decided that the district court had habeas corpus jurisdiction to review petitioner's claim.

2. This Court has long recognized that international law, as embodied in treaties and customary international law, is part of the law of the United States and that, where possible, federal statutes should be construed to avoid violating the law of nations.

3. International human rights law depends principally on states for its implementation and enforcement. As the current

[3] Thomas Hobbes, *Leviathan* 89 (1651) (Richard Tuck ed., 1991).

[4] Pet'n for Writ of Cert. at 6 (internal quotation marks and citation omitted).

[5] Br. for Resp.-Appellant to the Eighth Circuit at 44.

conditions in Somalia demonstrate, when a state has no functioning central government, international human rights law cannot be enforced. In light of the United States' commitment to fostering the system of international human rights, and its obligations by virtue of its membership in the United Nations and ratification of the U.N. Charter, this Court should interpret § 1231(b)(2) to prevent petitioner's deportation to Somalia until it has a functioning central government that accepts his return and can enforce human rights protections throughout its territory.

4. Under the International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, 999 U.N.T.S. 171, ratified by the United States on June 8, 1992, the United States cannot deport an alien to another country if there is a real risk that he will be subjected to torture or to cruel, inhuman, or degrading treatment or punishment. The United States' duty to make this assessment is critical before returning anyone to Somalia, given Somalia's lack of a functioning central government and what the Department of Homeland Security has itself described as "an atmosphere of lawlessness" and "ongoing armed conflict" that would "pose a serious threat to the[] personal safety" of any Somali national returned there.[6] This assessment has not been made in petitioner's case, and § 1231(b)(2) should thus be construed to prevent his return to Somalia until the United States has determined that it will not violate its *nonrefoulement* obligation under the ICCPR.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED HABEAS JURISDICTION

In the court of appeals, the government contested the district court's habeas corpus jurisdiction over petitioner's claim. *Amici* briefly address why the court of appeals correctly found habeas jurisdiction and submit that the federal courts must adjudicate an alien's challenge to his removal from the United States to ensure that U.S. immigration laws are

[6] Extension of the Designation of Somalia under Temporary Protected Status Program, 68 Fed. Reg. 43,147, 43,148 (July 21, 2003) ("Somalia TPS").

construed in accordance with U.S. obligations under international law.

The court of appeals correctly held that the district court properly exercised habeas jurisdiction on the ground that: (1) "substantial constitutional questions" would be raised if petitioner's "pure question of law" were not reviewable in *some* court; (2) petitioner's statutory claim could not be brought directly in the court of appeals because the Immigration and Nationality Act ("INA") bars petition-for-review jurisdiction where the alien is removable based on criminal convictions enumerated in 8 U.S.C. § 1252(a)(2)(C); and (3) no provision of the INA expressly repealed 28 U.S.C. § 2241 habeas jurisdiction and the scope of habeas corpus review encompasses questions of statutory interpretation. *Jama*, 329 F.3d at 632-33.

The court of appeals correctly found that 8 U.S.C. § 1252(a)(2)(C) bars petition-for-review jurisdiction over petitioner's claim because he is removable based on a criminal conviction (a crime of moral turpitude) enumerated in that provision. 329 F.3d at 632. *See Calcano-Martinez v. INS*, 533 U.S. 348, 351 (2001) (alien conceding removabality on the basis of criminal offense enumerated in § 1252(a)(2)(C) may not raise a statutory claim relating to final order of removal by petition for review).[7]

The court of appeals also correctly held that none of the INA's jurisdiction-stripping provisions divested the district court of § 2241 habeas jurisdiction because those provisions do not mention explicitly, much less repeal, the habeas statute. *INS v. St. Cyr*, 533 U.S. 289, 298-99, 308-15 (2001) (applying express statement rule and finding § 2241 habeas jurisdiction);

[7] In addition, the claim raised by petitioner could not be raised in a petition for review even where the alien is not removable on the basis of a criminal conviction. The claim does not allege an error in the final order of removal, but rather that the Attorney General may not enforce deportation to Somalia *until* Somalia has a functioning government. That claim arises only when the Attorney General actually seeks to enforce removal, and thus only after administrative and judicial proceedings have been completed. Thus, the claim presented here must be brought in habeas when, and if, the Attorney General seeks to deport an individual to a country whose conditions *at the time of actual deportation* render it an illegal removal destination under the INA.

Demore v. Kim, 538 U.S. 510, 517 (2003) (same).[8] Moreover, while the Constitution does not require that review of petitioner's claim occur by any particular mechanism or in any particular court, *St. Cyr*, 533 U.S. at 314 n.38, a preclusion of *all* federal review over that pure legal claim would violate the Suspension Clause of the U.S. Constitution. *St. Cyr*, 533 U.S. at 300-01. At an absolute minimum, *St. Cyr* makes clear that "substantial constitutional questions" would be raised by the preclusion of all such review. *Id.* at 300. Review of petitioner's claim by habeas corpus avoids that constitutional problem.

Finally, under article 13 of the ICCPR, *supra*, aliens may be deported only after a "competent authority" has heard their claims against deportation and reached "a decision in accordance with law." Moreover, aliens must be allowed to challenge their deportation[9] and must have an "effective" remedy against unlawful removal.[10] Habeas review of petitioner's claim satisfies these requirements.

[8] The court of appeals noted, 329 F.3d at 632-33, that *St. Cyr* found it unnecessary to address whether the language of 8 U.S.C. § 1252(g) repealed habeas jurisdiction because that provision applies only to three discrete actions by the Attorney General — the decision to commence proceedings, adjudicate cases, or execute final removal orders — and not to challenges to the validity of a removal order itself. *See St. Cyr*, 533 U.S. at 311 n.34. The court of appeals properly concluded that § 1252(g), like the jurisdiction-stripping provisions at issue in *St. Cyr*, could not repeal § 2241 habeas jurisdiction because it also lacked the express directive necessary to effectuate such a repeal. 329 F.3d at 632-33. Furthermore, the court of appeals found that petitioner's legal claim fell "outside the scope" of § 1252(g) because that section applies only to "discretionary" claims. *Id.* at 632. Thus, even if *St. Cyr's* express statement rule did not so plainly preclude § 1252(g) from repealing § 2241 habeas jurisdiction, § 1252(g) would not bar petitioner's non-discretionary claim under 8 U.S.C. § 1231(b)(2).

[9] *E.g.*, *Hammel v. Madagascar*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 155/1983, 29th Sess., U.N. Doc. CCPR/C/29/D/155/1983 (1987).

[10] *Giry v. the Dominican Republic*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 193/1985, 39th Sess., U.N. Doc. CCPR/C/39/D/193/1985 (1990).

II. FEDERAL STATUTES SHOULD BE INTERPRETED TO COMPLY WITH UNITED STATES' COMMITMENTS UNDER INTERNATIONAL LAW

International law, as embodied in both treaty and customary law, is part of the law of the United States. Under the Constitution, international treaties are the supreme law of the land. U.S. Const. art. VI, cl. 2 ("all Treaties, made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"). Customary international law is also part of the law of this nation. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. e (1987) ("*Restatement (Third)*") ("Cases arising under treaties to which the United States is a party, as well as cases arising under customary international law . . . [are] within the Judicial Power of the United States under Article III, Section 2 of the Constitution.").

Moreover, the United States' membership in the United Nations and ratification of the U.N. Charter require it to cooperate with other nations "in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction."[11] Indeed, the U.S. has repeatedly declared its intention to promote and protect human rights. *E.g.*, Implementation of Human Rights Treaties, Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (Dec. 10, 1998)

> It shall also be the policy and practice of the Government of the United States to promote respect for international human rights, both in [the United States'] relationships with all other countries and by working with and strengthening the various international mechanisms for the promotion of human rights, including . . . those of the United Nations . . . .

See also U.S. Dep't of State, *2002 Country Reports on Human Rights Practices*, Preface (2003) ("human rights are universal"

[11] Charter of the United Nations ("U.N. Charter"), art. 1(3), June 26, 1945, 59 Stat. 1031, 3 Bevans 1153, ratified by the United States on August 8, 1945.

and "their protection worldwide serves a core U.S. national interest").

Federal statutes should be interpreted and applied in accordance with international law, as "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814-15 (1993) (quoting *Charming Betsy* and labeling the principle a "canon of statutory construction"). This principle applies with particular force to statutory constructions that would otherwise lead to a violation of international human rights laws. For the reasons described below, this Court should interpret § 1231(b)(2) to prevent petitioner's deportation to Somalia under the current circumstances.

III. SECTION 1231(b)(2) SHOULD BE INTERPETED TO PREVENT PETITIONER'S REMOVAL TO SOMALIA UNTIL IT HAS A FUNCTIONING CENTRAL GOVERNMENT THAT ACCEPTS HIS RETURN AND CAN ENFORCE THE FUNDAMENTAL PROTECTIONS GUARANTEED UNDER HUMAN RIGHTS LAWS

A. International Human Rights Laws Cannot Be Adequately Enforced without a Functioning Central Government

The basic protections codified in international human rights law depend primarily on states for their implementation and enforcement.[12] These protections, as codified in the ICCPR, *supra*, include the: right to life (art. 6); right to be free from torture or cruel, inhuman, or degrading treatment or punishment (art. 7); right not to be subjected to arbitrary arrest and detention (art. 9); right to a fair hearing when accused of

[12] This brief discusses international human rights law, which refers to the body of law guaranteeing the rights of individuals with respect to the state, and which is distinct from international humanitarian law, the body of law governing the conduct of state and non-state actors in international and internal armed conflict. *Situation of Human Rights in Somalia, Report of the Special Rapporteur*, U.N. ESCOR, 55th Sess., U.N. Doc. E/CN.4/1999/103, ¶¶ 33-34 (1999) ("*Situation of Human Rights in Somalia (1999)*") (all parties to conflict in Somalia are bound by Common Article 3 to the four Geneva Conventions of August 12, 1949).

a criminal offense (art. 14); and right to equality before the law (art. 26).

Amici are well aware that governments are often egregious violators of human rights and that the existence of a functioning central government does not alone guarantee that human rights laws will be enforced. However, as the conditions in Somalia demonstrate, the absence of any such government or other competent authority necessarily means that they will not be enforced. *E.g., Jama*, 329 F.3d at 637 (Bye, J., dissenting) (by expelling petitioner to Somalia "we abandon a stateless person without a passport or traveling documents in a war-torn country victimized by battling warlords, and without a central government"); *Ali v. Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003) (government never "challenge[d] the assertion that [nationwide class of Somalis] would be subject to human rights abuses if removed to Somalia").[13] For this reason, and in light of the United States' commitment to upholding the system of international human rights based on its membership in the United Nations and ratification of the U.N. Charter, this Court should interpret § 1231(b)(2) to prohibit petitioner's deportation to Somalia until it has a functioning central government that accepts his return and can enforce basic human rights laws throughout its territory.

1. International Law Requires the Existence of a Functioning Central Government To Enforce Human Rights Protections

Protecting human rights has been one of the central goals of the international legal system for over half a century. The 1945 Charter of the United Nations, ratified by virtually every nation in the world, proclaimed the promotion of human rights and fundamental freedoms as one of the United Nations' main purposes.[14] The protection of human rights is acknowledged

[13] This still does not absolve non-state actors such as militias and local civilian authorities of their obligations to respect human rights and, in particular, not to commit war crimes in Somalia. *See, e.g., Situation of Human Rights in Somalia* (1999), *supra*, ¶¶ 33-34.

[14] U.N. Charter, *supra*, art. 1(3). There are presently 191 members of the United Nations. *See Status of Multilateral Treaties Deposited with the Secretary General, available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/bible.asp> (as of May 14, 2004).

by nearly all nations as the "first responsibility of Governments"[15] and forms an internationally recognized core of "obligations owed by all governments to their citizens."[16]

Like international law generally, human rights law operates on the principle that a state with a functioning central government enters into treaties to enforce "rights and obligations among [states]."[17] For the last half-century, treaties have connected almost every state in an effort to secure human rights, and the number of signatories and parties to these various multilateral human rights treaties underscores the breadth of this common commitment.[18] These treaties are

[15] U.N. World Conference on Human Rights, *Vienna Declaration and Programme for Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I), at 20-46 (Oct. 13, 1993), *reprinted in* 32 I.L.M. 1661, 1664-65 (1993).

[16] *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (internal quotation marks and citation omitted); *see also* Louis Henkin, "Evolving Concepts of International Human Rights and the Current Consensus," Paper Presented at the International Human Rights Session, Judicial Conference – Second Judicial Circuit of the United States (June 15, 1996), *reprinted in* 170 F.R.D. 201, 264 (1997) ("How a nation treats its own inhabitants is now everybody's business, potentially.").

[17] Louis Henkin, "The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny," 100 *Harv. L. Rev.* 853, 864 (1987); *see Restatement (Third), supra*, § 201 (defining state as "entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities"); The Montevideo Convention on Rights and Duties of States, art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 ("The state as a person of international law should possess," *inter alia*, a "government" and "capacity to enter into relations with the other states."); *see generally* J.L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* 1 (Humphrey Waldock ed., 6th ed. 1963) (defining international law as "the body of rules and principles of action which are binding upon civilized states in their relations with one another").

[18] *See, e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Dec. 9, 1948, 78 U.N.T.S. 277, ratified by the United States on Nov. 25, 1988 (41 signatories and 135 parties); International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), March 7, 1966, 660 U.N.T.S. 195, ratified by the United States on Oct. 21, 1994 (84 signatories and 169 parties); International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Dec. 16, 1966, 993 U.N.T.S. 3, signed by the United States on Oct. 5, 1977 (Cont'd)

entered into by national governments, which, in turn, are bound to enforce them throughout their respective countries.

The basic international human rights regime thus imposes affirmative obligations on governments to implement and enforce the rights guaranteed to individuals. For example, the ICCPR requires states parties "to respect and to *ensure* to all individuals" its various safeguards, ICCPR, *supra*, art. 2(1) (emphasis added), including the protection against torture or cruel, inhuman, or degrading treatment or punishment. *Id.* art. 7. This duty requires that states not only protect individuals from official action but also "take positive measures" to safeguard them from private interference with their human rights,[19] such as the right to life, ICCPR, *supra*, art. 6, and the right to personal security. *Id.* art. 9.[20] Similarly, the Convention Against Torture ("CAT") commands states parties "to *ensure* that all acts of torture are offences under [their] criminal law,"[21] while the Genocide Convention requires states to "undertake to *prevent and to punish* [genocide]."[22]

(Cont'd)

(65 signatories and 149 parties); ICCPR, *supra* (67 signatories and 152 parties); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 1465 U.N.T.S. 85, ratified by the United States on Oct. 2, 1994 (74 signatories and 136 parties). *See generally Status of Multilateral Treaties Deposited with the Secretary-General*, *supra* (listing signatories and parties).

[19] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* ¶ 20, at 38 (1993) ("*CCPR Commentary*").

[20] *See W. Delgado Paéz v. Colombia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 195/1985, 39th Sess., U.N. Doc. CCPR/C/39/D/195/1985 (1990) (ICCPR's guarantee of right to security was violated where Columbian government had failed to take appropriate measures to protect applicant against anonymous death threats and attacks that ultimately caused him to flee the country).

[21] CAT, *supra*, art. 4(1) (emphasis added).

[22] Genocide Convention, *supra*, art. 1 (emphasis added); *see also* CERD, *supra*, art. 5 ("States Parties *undertake to prohibit* and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law . . . .") (emphasis added).

Regional human rights treaties likewise impose affirmative duties on states parties to ensure that an individual's human rights are protected. *E.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), art. 1, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. 5 (as amended through Nov. 1998) ("[State] Parties *shall secure to everyone within their jurisdiction* the rights and freedoms [guaranteed under the] Convention.") (emphasis added).

Customary international law[23] also obligates states to prohibit and protect against human rights abuses, such as slavery, genocide, torture, or cruel, inhuman, or degrading treatment or punishment. *E.g.*, *Restatement (Third)*, *supra*, § 702 ("state violates international law if, as a matter of state policy, it practices, encourages, or condones [*inter alia*, genocide, slavery, murder, torture, cruel, inhuman, or degrading treatment or punishment, and apartheid]"); *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2d Cir. 1980) (recognizing prohibition against torture as customary international law); *see also Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 33-34 (Feb. 5) (obligation of states to prohibit certain acts, such as aggression, genocide, and those concerning the "basic rights of the human person, including protection from slavery and racial discrimination," is *erga omnes*, and thus reflects a state's obligation "towards the international community as a whole").[24]

Thus, the system of international human rights law that has developed over the last half-century has been based upon the belief that states with functioning central governments are responsible for enforcing human rights within their respective territories. As the situation in Somalia demonstrates, when no

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[23] Customary international law is a body of rules that states universally abide by "from a sense of legal obligation." *Restatement (Third)*, *supra*, § 102(2); *see also The Paquete Habana*, 175 U.S. at 700 ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations").

[24] Customary international law also directly regulates the conduct of individuals, prohibiting acts of piracy, genocide, slavery, and torture. *See generally* Steven R. Ratner et al., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 80-124 (2d ed. 2002).

such government exists, even the most basic human rights protections cannot adequately be secured.

2. Somalia Lacks a Functioning Central Government

Somalia is not merely the *only* country in the world without a government, but it has also been without one for over thirteen years, since the dictator Mohamed Siad Barre fled the country amid protests against his rule in January 1991. As the internationally recognized Somalia expert Kenneth Menkhaus recently observed, "Somalia's inability to preserve even a minimal figleaf of central administration over twelve years puts it in a class by itself among the world's failed states."[25] It is, he concluded, "a failure among failed states."[26] Indeed, the U.N. Security Council, of which the United States is a permanent member,[27] has repeatedly stated that the situation in Somalia is so grave that it "constitutes a threat to international peace and security in the region."[28]

The closest Somalia has come to a national government since 1991 was the formation of the Transitional National Government ("TNG") in August 2000. The TNG, however, has never controlled Somali territory beyond a part of the capital, Mogadishu,[29] nor has it ever established even the most basic services for the Somali population.[30] The United States has no

[25] Kenneth Menkhaus, "State Collapse in Somalia: Second Thoughts," 3 *Rev. Afr. Pol. Econ.* 405, 407 (2003).

[26] *Id.*; *see generally* Jennifer Moore, "From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents," 31 *Colum. Hum. Rts. L. Rev.* 81, 84 n.6 (1999) (describing characteristics of failed states).

[27] U.N. Charter, art. 23(1). The Security Council's primary responsibility is to maintain "international peace and security" in accordance with the principles and purposes of the United Nations. *Id.* art. 24(1).

[28] S.C. Res. 1519, U.N. SCOR, 4885th mtg., U.N. Doc. S/RES/1519 (Dec. 16, 2003).

[29] UNHCR, *Somalia: A Situation Analysis and Trend Assessment* (2003) ("*Somalia: A Situation Analysis*").

[30] The Danish Immigration Service, *Human Rights and Security in Central and Southern Somalia* (*Joint Danish, Finnish, Norwegian, and British Fact-Finding Mission*) 6 (Mar. 2004).

diplomatic relations with the TNG or any other entity in Somalia, maintains no embassy in Somalia, and has no consular relations in Somalia.[31]

The absence of a functioning central government has hindered the implementation of the United Nations embargo on the delivery of weapons and military equipment to Somalia since it went into effect in 1992. Indeed, the U.N. Security Council has been precluded from even addressing its concerns to any authority in Somalia. Instead, the Security Council has had repeatedly to implore "all Somali . . . parties" to cooperate fully with its Monitoring Group.[32]

Thus, for the past thirteen years Somalia has lacked a functioning central government. It has effectively become a failed state, embroiled in ongoing conflict among competing clans, sub-clans, and factions, and without any authority capable of enforcing human rights protections.[33]

3. The Prolonged Absence of a Functioning Central Government in Somalia Has Deprived Somalis of Protection of Their Most Basic Human Rights

Reports from Somalia confirm that the human rights and public security situation continues to deteriorate.[34] Amnesty International states that "rights have been systematically violated without any possibility of legal redress."[35] In a

[31] U.S. Dep't of State, Bureau of African Affairs, *Background Note: Somalia* (Oct. 2003), *available at* <http://www.state.gov/r/pa/ei/bgn/2863.htm> ("Somalia has been without a central government since 1991, and much of the territory has been subject to serious civil strife. There is no official U.S. representation in Somalia.").

[32] S.C. Res. 1519, *supra*, ¶ 4; S.C. Res. 1474, ¶ 6, U.N. SCOR, 4737th mtg., U.N. Doc. S/RES/1474 (Apr. 8, 2003).

[33] *E.g.*, Guy S. Goodwin-Gill, *The Refugee in International Law* 76 (2d ed. 1996) (describing Somalia as a conflict in which "competing clans, sub-clans and factions compete amongst themselves, but none emerges as an authority in fact").

[34] Menkhaus, "State Collapse in Somalia," *supra*, at 13 ("Somalia today is gripped by more insecurity and armed clashes than at any time since 1996.").

[35] Amnesty International, *Somalia: No Lasting Peace Without Human Rights* 1 (2002).

territory long without any central authority to enforce the rule of law, it has become "easy for small numbers of individuals and groups to incite armed clashes."[36] In 2003, there were numerous cases of rape, including the rape of children, and widespread abductions and savage killings of women.[37] Somalia's best-known human rights organization, the Dr. Ismael Jumale Human Rights Center, documented 530 civilian deaths in armed conflicts between July 2002 and June 2003. As the United Nations High Commissioner for Refugees ("UNHCR") recently reported, "throughout the country, human rights violations remain endemic . . . [including] murder, looting and destruction of property, use of child soldiers, kidnapping, discrimination of minorities, torture, unlawful arrest and detention, and [the] denial of due process by local authorities ."[38]

The U.S. government's assessment of conditions in Somalia is equally bleak. Since September 1991, it has annually renewed Temporary Protected Status ("TPS") for Somalis in the United States (most recently extended through September 2004),[39] based on its determination that the "ongoing armed conflict . . . would pose a serious threat to the[] personal safety" of those returned to Somalia.[40] Indeed, the Department of Homeland Security ("DHS") recently underscored that "[m]ajor regions of the country are under the control of bandits and the population is beyond the reach of the rule of law."[41] Notably, while DHS has authority to limit a TPS designation to part of a foreign state, the designation for Somalia covers

[36] *Id.; see also* The Danish Immigration Service *supra*, at 11 ("overall security and human rights situation in Somalia [has] deteriorated to an extent not seen for some years") (quoting representative of international organization in southern Somalia).

[37] Danish Immigration Service, *supra*, at 11.

[38] UNHCR, *Position on the Return of Rejected Asylum Seekers to Somalia* 2 (Jan. 2004) ("*Position on the Return of Rejected Asylum Seekers to Somalia*").

[39] Somalia TPS, *supra*, 68 Fed. Reg. at 43,147.

[40] *Id.* at 43,148. Petitioner's criminal conviction, however, rendered him ineligible for TPS status. 8 U.S.C. § 1254(c)(2)(B).

[41] Somalia TPS, *supra*, 68 Fed. Reg. at 43,147.

the entire country.[42] The U.S. State Department continues to document the grave risks to personal safety in Somalia, recently finding, for example, that "police and militia members committed numerous, serious human rights abuses throughout the country" and that prison conditions continue to be "harsh and life threatening."[43]

Mogadishu remains dangerous and divided, with rival clans fighting for control over various parts of the city.[44] Kidnapping for ransom has become increasingly prevalent in Mogadishu,[45] and at least 185 people were abducted there last year.[46] Any person believed to have money, or access to money, makes a particularly attractive target, including businessmen, school children of wealthy parents, and Somalis who have returned from abroad.[47] In fact, returnees are at particular risk of being robbed, extorted, or attacked by militias throughout the country because they are widely perceived to have wealth[48] and to lack any clan or family,[49] now the main source of protection in the absence of a functioning central government.

The lack of effective government and rampant violence have combined to deprive the Somali population of even the most basic services and have made the humanitarian situation there among the worst in the world. The situation has deteriorated considerably during the last thirteen years. In 1996, Somalia ranked 172 out of 174 countries on the Human

[42] *Id.*

[43] U.S. Dep't of State, *Country Reports on Human Rights Practices 2003, Somalia* 1 (2004) ("*U.S. Country Reports on Human Rights: Somalia*"). The State Department has not noted any improvement in human rights conditions in Somalia since issuing its most recent report.

[44] The Danish Immigration Service, *supra*, at 6.

[45] *Position on the Return of Rejected Asylum Seekers to Somalia, supra*, at 1.

[46] *U.S. Country Reports on Human Rights: Somalia, supra*, at 3.

[47] The Danish Immigration Service, *supra*, at 21.

[48] *Id.* at 44.

[49] *Position on the Return of Rejected Asylum Seekers to Somalia, supra*, at 8.

Development Index ("HDI"),[50] which measures a country's average achievements in the three basic categories of human development.[51] Since then, Somalia has been excluded from the HDI altogether because the U.N. Development Programme has not been able even to collect the necessary data amid the highly volatile situation in that country. Without a functioning central government in Somalia, not even this basic information can be securely gathered.

B. Victims Have No Remedy for Human Rights Abuses without a Reliable Legal System

1. A Reliable Legal System Is Necessary To Remedy Human Rights Abuses

Under international law, states must provide a remedy for human rights violations. The ICCPR, for example, requires that states parties take the necessary measures to ensure that victims of human rights violations "have an effective remedy" against the violators through the appropriate "judicial, administrative, or legislative authorities." ICCPR, *supra*, art. 2(3). States are thus obliged to take positive steps to "safeguard" these rights by creating a functioning legal system with the necessary procedural guarantees.[52]

Similarly, the Convention Against Torture explicitly requires each state party to guarantee that its appropriate authorities promptly and impartially investigate torture allegations[53] and to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation."[54] But without the

[50] *Situation of Human Rights in Somalia, Report of the Independent Expert*, U.N. ESCOR, 60th Sess., U.N. Doc. E/CN.4/2004/103, at 12 (2003) ("*Situation of Human Rights in Somalia (2003)*").

[51] Those categories are: life expectancy at birth; knowledge (as measured by adult literacy and combined primary, secondary, tertiary gross enrollment ratio); and standard of living (as measured by Gross Domestic Product per capita). United Nations Development Programme, *FAQs on the Human Development Indices, at* <http://hdr.undp.org/statistics/faq.cfm#1>.

[52] *CCPR Commentary, supra*, ¶ 19, at 37.

[53] CAT, *supra*, art. 12.

[54] *Id.* art. 14.

components of a functioning central government – such as national law enforcement and judicial institutions – states cannot provide an effective domestic remedy even for such grave human rights violations.

2. Somalia Lacks a Functioning or Reliable Legal System

In Somalia, there is presently no rule of law, no national justice system, and in southern and central Somalia, no courts at all.[55] The only option for many Somalis who wish to resolve a dispute or to seek a remedy for abuse without seizing a weapon is to consult clan elders, who often favor blood compensation. This *ad hoc* system cannot cope with the sheer scale of the crimes and abuses now occurring, especially where Somali militias have escaped the social control of clan elders.[56]

Islamic Sharia courts function in some areas in the north, dispensing sentences such as amputation, flogging, and execution that contradict human rights norms. Where local courts do function, judges typically lack legal training and base their rulings on a multiplicity of contradictory laws.[57] Members of the judiciary in the town of Kismayo told a visiting U.N. human rights expert in 2003 that they had no written copies of laws, so they rendered judgments based on what they remembered of the law.[58] The U.S. State Department reported earlier this year that, in the cities of Bosasso and Afmadow, "criminals [are] turned over to the families of their victims, who then [extract] blood compensation in keeping with local tradition."[59]

The few, disparate regional and local authorities in Somalia are incapable of preserving the rule of law or enforcing basic human rights guarantees. There are two quasi-governments operating in the Somaliland and Puntland regions, and the remnants of the TNG still control some

[55] The Danish Immigration Service, *supra*, at 28; *see also U.S. Country Reports on Human Rights: Somalia, supra*, at 1 (Somalia has no national justice system).

[56] The Danish Immigration Service, *supra*, at 28.

[57] *Id.* at 27.

[58] *Situation of Human Rights in Somalia (2003), supra*, at 10.

[59] *U.S. Country Reports on Human Rights: Somalia, supra*, at 3.

security forces.[60] However, the Somaliland, Puntland, and TNG authorities do not effectively provide remedies for human rights abuses; to the contrary, they are notorious for committing abuses themselves. The U.S. State Department has reported allegations of torture by the Somaliland and Puntland administrations,[61] and the Somaliland, Puntland, and TNG authorities have all been accused of using arrest and detention as weapons against political opponents and journalists.[62] Local police and security forces often use lethal force against civilians without just cause; in some cases, they have done so simply to stop vehicles.[63] As the UNHCR recently put it, "while the *de facto* authorities are accountable for the human rights situation in the areas they control, many are either not aware of or choose to ignore international conventions, or do not have the capacity to enforce respect for human rights and justice."[64]

Indeed, even the few Somalis charged with keeping the public order can become targets of violence and other abuses. For example, on June 21, 2003, the authorities in Somaliland detained General Jama Muhammad Ghalib, a former Minister of the Interior in Somalia, for allegedly advocating the formal reunification of Somaliland with Somalia.[65] On December 9, 2003, a police commander in the city of Hargeysa was murdered, reportedly for investigating a traffic accident.[66]

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[60] *See generally* International Crisis Group, *Biting the Somali Bullet* (2004).

[61] *U.S. Country Reports on Human Rights: Somalia*, *supra*, at 3.

[62] *Somalia: A Situation Analysis*, *supra*, at 36; *see also* Amnesty International, *Amnesty International Report 2003: Somalia* 2 (2003).

[63] Kenneth Menkhaus, "Warlords and Landlords: Non-State Actors and Humanitarian Norms in Somalia," *Conf., Liu Inst. Glob. Iss., Univ. B.C.* 1, 7 (2003).

[64] *Position on the Return of Rejected Asylum Seekers*, *supra*, at 2.

[65] *Situation of Human Rights in Somalia* (2003), *supra*, at 10.

[66] *Report of the Secretary General on the Situation in Somalia*, U.N. SCOR, U.N Doc. S/2004/115, at 5 (Feb. 12, 2004) (emphasis added) ("*Report of the Secretary General*").

In such conditions, Somalis cannot rely on even the most minimal degree of personal security nor hope that even basic human rights protections will be enforced.

As noted, Somalis returning from abroad face particular hardship and insecurity. In the absence of any centralized authority, an individual's main source of protection comes from his family or sub-clan. As the U.S. Secretary of Homeland Security stated, without the rule of law or state institutions, "Somalis within the country rely on family connections and collective security for survival," which makes "[n]ew arrivals, outside this network . . . extremely vulnerable."[67] Indeed, those returning from abroad often discover that members of their families and sub-clans have been displaced or killed, leaving them even more vulnerable to the rampant violence and lawlessness. As Amnesty International recently observed, "clan support mechanisms provide the only safety in the disintegrated state – but at the same time this fuels clan conflict and discrimination."[68] Thus, the absence of a functioning central government may make Somalia an even more dangerous place for those returning from abroad than for the already beleaguered and embattled population now living there.[69]

In short, Somalia's recent history demonstrates that human rights will not be respected where the absence of a functioning central government means those rights cannot be enforced. Moreover, the U.N. Security Council, of which the United States is a member, has consistently passed resolutions acknowledging that the situation in Somalia poses a threat to international peace and security. As discussed above, in light

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[67] Somalia TPS, *supra*, 68 Fed. Reg. at 43,138.

[68] Amnesty International, *Supporting and Strengthening the Work of Somali Human Rights Defenders – a Workshop Report* 2 (July 1, 2003).

[69] Somaliland declared independence from Somalia in 1991, but has failed to persuade any other country to recognize it. Even so, the Somaliland authorities regard Somalis from other parts of the country (or from abroad) as "foreigners," and issued a directive last September ordering the deportation from their territory of "illegal immigrants" – a class they define to include Somalis from the south. *Report of the Secretary General*, *supra*, at 6. New arrivals to Somaliland would thus face severe hardships and risks if deported there. *Position on Return of Rejected Asylum Seekers*, *supra*, at 6-7.

of the United States' commitment to fostering human rights law in a system that depends on the existence of functioning central governments for its enforcement, this Court should interpret 1231(b)(2) to prevent petitioner's removal to Somalia until it has such a government that accepts his return and can protect basic human rights throughout its territory.

IV. THE UNITED STATES' *NONREFOULEMENT* OBLIGATION UNDER THE ICCPR ALSO SUPPORTS INTERPRETING § 1231(b)(2) TO PREVENT PETITIONER'S RETURN TO SOMALIA

U.S. obligations under treaties and customary international law restrict its ability to remove aliens based on the potential harms they might face.[70] Under article 7 of the ICCPR, for example, the United States must first assess whether there is a real risk an alien would be exposed to torture or to cruel, inhuman, or degrading treatment or punishment before returning him to another country. The United States has not made this assessment in petitioner's case, even though it has recognized the atmosphere of lawlessness and widespread human rights abuses in Somalia and the particular dangers returnees face. Section 1231(b)(2) should thus be construed to prevent petitioner's deportation to Somalia until the U.S. has fulfilled its duty to determine that his return will not violate its *nonrefoulement* obligation under the ICCPR. *E.g.*, Implementation of Human Rights Treaties, Exec. Order No. 13,107, *supra*, 63 Fed. Reg. at 68,991 ("It shall be the policy and practice of the Government of the United States, being

[70] *See* Convention Relating to the Status of Refugees, art. 33, July 28, 1951, 189 U.N.T.S. 150 ("1951 Refugee Convention"); Protocol Relating to the Status of Refugees, art. 1, Jan. 13, 1967, 606 U.N.T.S. 267, entry into force by the United States (by accession) on Nov. 1, 1968 (obligating states parties to "apply articles 2 to 34 inclusive of the [1951 Refugee Convention]"); CAT, *supra*, art. 3(1); ICCPR, *supra*, art. 7; *see also* UNHCR, *The Scope and Content of the Principle of Non-Refoulement* (Opinion of Sir Elihu Lauterpacht & Daniel Bethlehem), ¶¶ 217-53 (2001) ("*Scope of Non-Refoulement*") (citing, *inter alia*, 1951 Refugee Convention (art. 33), CAT (art. 3), the European Convention (art. 3), and ICCPR (art. 7) as sources of *nonrefoulement* obligations under customary international law); *Ali*, 346 F.3d at 885-86 (recognizing United States' *nonrefoulement* obligations under customary international law as well as under ICCPR, CAT, and 1951 Refugee Convention).

committed to the protection and promotion of human rights and fundamental freedoms, fully to respect and implement its obligations under the international human rights treaties to which it is a party, *including the ICCPR* [and the Convention Against Torture . . . .") (emphasis added).[71]

The Human Rights Committee ("the Committee"), recognized as the authoritative body in interpreting the ICCPR,[72] including by U.S. courts,[73] instructs that "[s]tates parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."[74] The Committee's jurisprudence further

[71] In ratifying the ICCPR, the United States declared articles 1-27 non-self-executing. U.S. Sen. Exec. Rep. 102-23 (102d Cong., 2d Sess. 1992), *reprinted in* 31 I.L.M. 645, 657 ("U.S. Sen. Exec. Rep.") (ICCPR does "not create a private cause of action" under the treaty). This declaration appears to be inconsistent with the purposes of the ICCPR and the Supremacy Clause. U.S. Const. art. VI, cl. 2; *see United States v. Duarte-Acero*, 208 F.3d 1282, 1284 (11th Cir. 2000). Moreover, whether or not the ICCPR is self-executing need not be decided here since it is being invoked defensively and not to create a private cause of action. *Cf. United States v. Duarte-Acero*, 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (declaration does not apply when raising "ICCPR claims defensively").

[72] The Human Rights Committee is the body established by Article 40 of the ICCPR to monitor and interpret state compliance with that treaty, and is authorized to issue "such general comments as it may consider appropriate." ICCPR, *supra*, art. 40(4). Those general comments are addressed to all states parties and are intended, among other things, "to draw the attention of the States parties to matters relating to the improvement of . . . the implementation of the Covenant" and to "stimulate activities of States parties . . . in the promotion and protection of human rights." U.N. H.R. Comm., *Statement on the Duties of the Human Rights Committee under article 40 of the Covenant*, Decision of the Committee of 30 Oct. 1980, U.N. Doc. CCPR/C/18; A/36/40, *reproduced in CCPR Commentary*, *supra*, Appendix at 845. Thus, such comments are an important interpretive guide to a state party's obligations under the treaty.

[73] *Duarte-Acero*, 208 F.3d at 1285 n.12; *see also United States v. Bakeas*, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997).

[74] U.N. H.R. Comm., *General Comment 20, Article 7*, 44th Sess., U.N. Doc. HRI\GEN\1\Rev.1, at 30, ¶ 9 (1994) ("General Comment 20"); *see also* U.N. H.R. Comm., *General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th Sess., U.N. Doc. CCPR/C/74/CRP.4/Rev.6, ¶ 12 (2004) (reiterating *nonrefoulement* obligation under ICCPR).

explains that under the ICCPR states parties must assess whether deportation would expose a person to "a real risk" of the harms prohibited by article 7.[75] States parties must therefore "ensure that they carry out their other legal commitments, whether under domestic law or under agreements with other states, in a manner consistent with [the ICCPR]."[76] Moreover, article 7 is non-derogable and permits no exception, in contrast to other provisions of the ICCPR that allow states parties to derogate from their obligations in "time of public emergency which threatens the life of the nation." ICCPR, *supra*, art. 4(1).

The ICCPR's *nonrefoulement* obligation has also been recognized by other countries. The Supreme Court of Canada, for example, has determined that article 7 forecloses a state from expelling a person to a place where he will face harms prohibited under the treaty.[77] The Australian government has similarly stated that the ICCPR imposes an "implicit" duty of *nonrefoulement* where "as a necessary or foreseeable consequence of [a person's] removal or deportation from Australia, the person would face a real risk of violation of his or her rights under Article 6 (right to life), or Article 7 (freedom from torture or cruel, inhuman or degrading treatment or punishment) of the ICCPR."[78] Analogous provisions of regional human rights treaties likewise prohibit *refoulement* based on a risk of torture or inhuman or degrading treatment or punishment.[79]

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[75] *A.R.J. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 692/1996, 60th Sess., U.N. Doc. CCPR/C/60/D/692/1996, ¶ 6.8 (1997).

[76] *Id.*; *see also T. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 706/1996, 61st Sess., U.N. Doc. CCPR/C/61/D/706/1996, ¶ 8.1 (1997).

[77] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.R. No. 3, ¶ 67 (Can. 2002) (reading article 7 with General Comment 20 of Human Rights Committee).

[78] *Akpata v. Minister for Immigration*, 2004 FCAFC 65, ¶¶ 32, 39 (Fed. Ct. Aust. 2004) (citing Minister for Immigration Direction No. 21, *Direction under Section 449 - Visa Refusal and Cancellation Under Section 501 of the Migration Act 1958*, Aug. 23, 2001, ¶¶ 2.18-2.21).

[79] *See, e.g., Chahal v. United Kingdom*, 23 Eur. H.R. Rep. 413 (1991) (under European Convention on Human Rights, art. 3, prohibiting return to India

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In this case, the United States has not assessed whether petitioner could face a real risk of torture or cruel, inhuman, or degrading treatment or punishment under the ICCPR – a critical inquiry given the current circumstances in Somalia. *Amici* recognize that petitioner was found ineligible for relief under the Refugee Convention because of his criminal conviction,[80] and that his claim under the Convention Against Torture was rejected by the immigration court and not challenged in his habeas action.[81] However, the United States' *nonrefoulement* obligation under the ICCPR is different in substance and scope than its obligations under the Refugee Convention and CAT. Specifically, *nonrefoulement* under the Refugee Convention is limited to those who meet the definition of a "refugee"[82] and who also are not subject to an independent bar, for example, based upon conviction of "a particularly serious crime."[83] By contrast, *nonrefoulement* under the ICCPR

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of Sikh activist, found deportable as threat to national security, based on risk of ill-treatment by Indian authorities); *see also Modise v. Botswana*, African Comm. Hum. & Peoples' Rights, Comm. No. 97/93, 21st Sess. (not dated), *available at* <http://www1.umn.edu/humanrts/africa/comcases/97-93b.html> (under African Charter on Human and Peoples' Rights, holding that alien's deportation forcing him to live in uninhabited strip of "no-man's land" land between Botswana and South Africa for prolonged period of time without shelter constituted inhuman or degrading treatment that offended the "dignity of a human being").

[80] The immigration judge found petitioner ineligible for withholding of removal based on his conviction of third degree assault, which the judge determined to be "a particularly serious crime" under 8 U.S.C. § 1231(b)(3)(B)(ii). Decision of the Immigration Judge, 8th Cir. Joint Appendix at 21-23. Respondent submitted a Joint Appendix in its appeal to the 8th Circuit (hereinafter "8th Cir. J.A.").

[81] *But see infra* notes 98-99.

[82] 1951 Refugee Convention, *supra*, art. 33(1) (prohibiting states parties from deporting an individual whose life or freedom would be threatened on ground of race, religion, nationality, political opinion, or membership in particular social group).

[83] *Id.* art. 33(2) (*nonrefoulement* obligation inapplicable where individual, "having been convicted . . . of a particularly serious crime, constitutes a danger to the community of that country"). Although the immigration judge's conclusion that petitioner's third degree assault constituted "a particularly serious crime" is not before this Court, *amici*

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is not predicated on the status or conduct of an individual,[84] but instead applies to all persons.

While CAT imposes an absolute duty of *nonrefoulement* where there are "substantial grounds for believing [an individual] would be in danger of being subjected to torture,"[85] it is more limited in scope than the ICCPR. The text of CAT restricts the definition of torture to acts "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity,"[86] and thus has not generally been understood to reach private conduct. In contrast, the Human Rights Committee instructs that a state has a positive "duty [under the ICCPR] . . . to afford everyone with protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a *private capacity*."[87] Indeed, the Committee has explicitly acknowledged the importance of protecting against "private assaults on bodily integrity and dignity."[88]

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believe that this determination was inconsistent with international jurisprudence. *E.g.*, *Scope of Non-Refoulement*, *supra*, ¶ 186 (construing particularly serious crime more narrowly to include "murder, rape, armed robbery, arson"); *see also id.* ¶ 191-92 (construing "danger" more narrowly to mean "very serious danger" and "as a reference to the safety and well-being of the population in general").

[84] *Scope of Non-Refoulement*, *supra*, ¶ 240; *see also* General Comment 20, *supra*, ¶ 2 (purpose of ICCPR article 7 is to protect "the dignity and the physical and mental integrity of the *individual*") (emphasis added).

[85] CAT, *supra*, art. 3(1) (obligating states parties not to "expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[86] *Id.* art. 1(1).

[87] General Comment 20, *supra*, ¶ 2 (emphasis added); *see also* General Comment 31, *supra*, ¶ 8 (recognizing that article 7 "implicitly" obligates states parties "to take positive measures to ensure private persons or entities do not inflict torture, or cruel, inhuman or degrading treatment or punishment on others within their power").

[88] Sarah Joseph et al., *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 149 (2000) (internal quotation marks omitted).

Also, article 3 of CAT expressly forbids *refoulement* based on fear of torture,[89] and does not reach lesser forms of "impugned treatment."[90] The ICCPR, by contrast, prohibits *refoulement* based on the scope of *all* article 7 treatment – not only torture, but also cruel, inhuman, or degrading treatment or punishment.[91] The ICCPR does not precisely define these terms.[92] And although the Human Rights Committee has not considered it "necessary to establish sharp distinctions between the different kinds of punishment or treatment," it has stated that "the distinctions depend on the nature, purpose and severity of the treatment applied."[93] The Committee has also made clear that the prohibition against torture or cruel, inhuman, or degrading treatment or punishment under article 7 extends "not only to acts that cause physical pain but also to acts that cause mental suffering to the victim."[94] Moreover,

[89] CAT, *supra*, art. 3(1).

[90] Joseph, *supra*, at 162.

[91] General Comment 20, *supra*, at ¶ 2.

[92] The United States has made a reservation to article 7 of the ICCPR, noting that it "considers itself bound to article 7 to the extent that 'cruel, inhuman or degrading treatment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendment" to the U.S. Constitution. U.S. Sen. Exec. Rep., *supra*, 31 I.L.M. at 654. The Human Rights Committee found the U.S. reservation to Article 7 to be incompatible with the treaty's object and purpose. U.N. H.R. Comm., *Concluding Observations of the Human Rights Committee: United States of America*, 53rd Sess., U.N. Doc. CCPR/C/79/Add.50; A/50/40, ¶ 279 (1995). *Amici* agree with this analysis, and believe that the United States' attempt to narrow the treaty's scope is incompatible with its goal of preventing a wide range of human rights abuses. *See also* U.N. H.R. Comm., *General Comment No. 24 (52)*, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), ¶ 8 ("provisions in the [ICCPR] that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in . . . torture, to subject persons to cruel, inhuman or degrading treatment or punishment . . . .").

[93] General Comment 20, *supra*, ¶ 4.

[94] *Id.* ¶ 5; *see Vuolanne v. Finland*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 265/1987, 35th Sess., U.N. Doc. CCPR/C/35/D/265/1987, ¶ 9.2 (1989) (determination of
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the Committee has instructed that the prohibition in article 7 is applicable in instances where people are "deprived of their liberty."[95]

In interpreting article 3 of the European Convention on Human Rights and Fundamental Freedoms, an analogous provision to article 7 of the ICCPR,[96] the European Court of Human Rights stated that the distinction between "torture" and "inhuman or degrading treatment" relates principally to the intensity of suffering inflicted. *Ireland v. United Kingdom*, 25 Eur. H.R. Rep. 25, 26 (1979). Specifically, the court emphasized that the assessment of ill treatment under article 3 of the European Convention is relative, and depends upon "all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim." *Id.* at 79. It considered "[i]nhuman" treatment to be anything that causes "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto," *id.* at 79-80, and "[d]egrading" treatment to be anything that "arouse(s) in . . . victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking down their physical or moral resistance." *Id.* at 80. "Torture," in contrast, constitutes an "aggravated form of inhuman treatment causing intense physical and/or mental suffering." *Id.* at 109.

These distinctions are important in assessing a country's *nonrefoulement* obligations. For example, in *C. v. Australia*, Views of the H.R. Comm. under art. 5, ¶ 4 of the Optional Protocol to the ICCPR, Comm. No. 900/1999, 76th Sess., U.N. Doc. CCPR/C/76/D/900/1999, ¶ 10 (2002), the Human Rights Committee barred the deportation of a alien to Iran based on

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whether treatment violated article 7 is subjective evaluation, based upon such factors as duration and manner of treatment, treatment's physical or mental effects, and sex, age, and victim's state of health).

[95] General Comment 20, *supra*, ¶ 2 (citing ICCPR, *supra*, art. 10(1), which requires that such persons be treated "with humanity and with respect for the inherent dignity of the human person").

[96] The only difference between the two provisions is that article 7 of the ICCPR adds the term "cruel" to the conduct prohibited.

its conclusion that the applicant's rights under ICCPR article 7 would be violated if he were returned there. Although he had previously been granted refugee status, the applicant was ordered deported based upon a criminal conviction. *Id.* ¶¶ 2.6-2.8. He appealed, arguing, *inter alia*, that returning him to Iran would "expose him to a real risk" of torture or of cruel, inhuman or degrading treatment or punishment in violation of article 7 of the ICCPR. *Id.* ¶ 3.2. The Committee observed that the applicant's psychiatric illness had been "triggered" by his "protracted . . . immigration detention" in Australia. *Id.* ¶ 8.4. It concluded that because it was "unlikely" he "would receive treatment necessary for the illness" in Iran, his removal there would violate Australia's *nonrefoulement* obligation under article 7.

In *Ahmed v. Austria*, 24 Eur. H.R. Rep. 278 (1996), the European Court of Human Rights construed an analogous provision to article 7 of the ICCPR to block Austria's decision to return an alien to Somalia even though his refugee status had been revoked based upon a criminal conviction. The court rejected Austria's argument that, because the applicant feared persecution by non-state actors, he was outside the scope of article 3 of the European Convention, which prohibits torture or inhuman or degrading treatment or punishment. *Id.* at 279, 291. It further determined that Austria was obligated to consider the consequence of his expulsion to Somalia. *Id.* at 291. In rejecting Austria's argument that the applicant would not face ill treatment upon his return, the court concluded that "[i]t is sufficient that those who hold substantial power within the State, even though they are not the Government, [could] threaten the life and security of the applicant." *Id.* at 289. Specifically, the court found that Somalia "was still in a state of civil war and [that] fighting was going on between a number of clans vying with each other for control of the country . . . and [t]here was no indication that the dangers to which the applicant would have [previously] been exposed . . . had ceased to exist or that any public authority would be able to protect him." *Id.* at 291. The court thus concluded that the applicant's deportation to Somalia would breach article 3 "for as long as he face[d] a serious risk of being subjected there to torture or

inhuman or degrading treatment." *Id.* at 292. And while the court acknowledged Austria's interest in expelling aliens who commit crimes, it stated that this interest was subordinate to the absolute prohibition of article 3, "which enshrines one of the fundamental values of democratic societies." *Id.* at 290

Finally, there is also a serious question whether returning petitioner to Somalia under the current circumstances would violate the United States' obligation under CAT.[97] First, the immigration judge denied petitioner's claim for relief under CAT because he did not find it "more likely than not" that he would be subjected to torture "by any governmental group or by a person acting in any official capacity." 8th Cir. J.A. at 24-25. This assessment apparently did not take into account international jurisprudence concerning the risk of torture in a state without a functioning central government, like Somalia, where private individuals who exercise government functions can effectively become "public official[s] or other person[s] acting in an official capacity."[98] Second, the immigration judge rejected petitioner's CAT claim based upon petitioner's return to northern Somalia, which the judge concluded was more secure because petitioner's sub-clan "appear[ed]" to have control of that area. 8th Cir. J.A. at 24. But in seeking to effect the removal order, the United States altered the destination to Hargeysa in Somaliland,[99] an area controlled by a different

[97] Although petitioner did not raise his CAT claim in his habeas petition, the United States must still comply with its obligations under the ratified treaty. *Cf.* Exec. Order No. 13,107, *supra*, 63 Fed. Reg. 68,991.

[98] *See Elmi v. Australia*, Views of the Comm. Against Torture, under art. 22 of CAT, Comm. No. 120/1998, 22nd Sess., U.N. Doc. CAT/C/22/D/120/1998, ¶ 6.5 (1999) (blocking applicant's deportation to Somalia). In *Elmi*, the CAT committee, the authoritative body interpreting that treaty, CAT, *supra*, art. 17, rejected Australia's argument that the applicant's fear of torture by members of Somali clans was outside the definition of torture under article 1. *Id.* at ¶ 4.8.

[99] *Jama v. Ashcroft*, No. Civ. 01-1172, 2004 WL 67658, at *5 n.15 (D. Minn. Jan. 14, 2004) (citing transcript from Oct. 26, 2003 telephone conference between parties and district judge, in which petitioner "expressed his conviction that he would be killed if he was returned to Hargeysa, in Somaliland, where the government indicated he would be deported"), *rev'd on other grounds*, 362 F.3d 1117 (8th Cir. 2004).

clan than petitioner's, and an area arguably more dangerous for him – a critical change in a country which lacks a functioning central government to enforce human rights protections throughout its territory.

In sum, under the ICCPR the United States must ensure it will not expose a person to a real risk of torture or of cruel, inhuman, or degrading treatment before deporting him to another country. The United States' failure to meet this obligation is particularly concerning, given Somalia's lack of a functioning central government, atmosphere of lawlessness, ongoing armed conflict among rival clans, and widespread human rights abuses. Moreover, with the clan and family now offering Somalis the main source of protection, returnees face particular dangers, especially those like petitioner, who was previously admitted to the United States as a refugee after fleeing Somalia in 1991 at the age of 12, *see* 8th Cir. J.A. at 8, 10, 30, and who does not know if family members remain in the country. 8th Cir. J.A. at 10. As the Secretary of Homeland Security has himself acknowledged, "[n]ew arrivals outside this [traditional family] network, would be extremely vulnerable," and that returning persons to Somalia in the current circumstances "would pose a serious threat to their personal safety."[100] Accordingly, § 1231(b)(2) should be construed to prevent the petitioner's return to Somalia until the United States has determined that it will not violate its *nonrefoulement* obligation under the ICCPR.

[100] Somalia TPS, *supra*, 68 Fed. Reg. at 43,148.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

KEYSE G. JAMA,
Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether immigration officials may remove petitioner to his country of birth under 8 U.S.C. § 1231(b)(2)(E)(iv), where that country lacks a functioning central government that is able either to accept petitioner's return or to withhold acceptance.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. *See, e.g., Benitez v. Mata,* No. 03-7434 (U.S., dec. pending); *Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

must be afforded broad power to deport aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, as a result of a decision from the Ninth Circuit, scores of criminal aliens at this moment are walking freely on the nation's streets, despite having been convicted of serious felonies and despite being subject to final orders of removal. *Amici* are filing an *amicus curiae* brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous alien felons outweigh whatever rights those criminal aliens may have to avoid removal to a country that lacks a functioning central government.

STATEMENT OF THE CASE

Petitioner Keyse G. Jama is a citizen of Somalia who arrived in this country in 1996 at age 17. During the three years he lived freely in American society, he proved to be an incorrigible criminal: court records from Hennepin County, Minnesota indicate that Jama was arrested on 12 separate occasions in Hennepin County during that three-year period, including at least four arrests for assault and one for robbery. Joint Appendix ("J.A.") 11, 18.

Jama was incarcerated as a result of an assault on June 15, 1999. Police reports indicate that three individuals were found by police on a street corner at 4:00 a.m. suffering from stab wounds that required hospitalization; all three identified Jama as their assailant. *Id.* at 14. Jama pleaded guilty to third degree assault and was given a suspended sentence of one year and a day in prison. *Id.* Conditions of his probation included that he avoid becoming intoxicated and that he serve a brief term in the

county jail. *Id.* at 15.[2] Shortly after completing the jail term, Jama was found to be intoxicated on October 21, 1999; his probation was revoked, and he was ordered to serve his prison sentence. *Id.* at 15-16. While in prison, Jama's poor disciplinary record resulted in his being required to serve his entire sentence. *Id.* at 18. He has remained in the custody of immigration authorities since his release from prison.

As a result of Jama's felony assault conviction, the Immigration and Naturalization Service (INS) initiated removal proceedings against him. At an August 2000 hearing, Jama conceded removability under the INA by virtue of having been convicted of "a crime involving moral turpitude." The Immigration Judge (IJ) denied Jama's applications for: (1) waiver of inadmissibility; (2) adjustment of status; (3) withholding of removal (because Jama had been convicted of "a particularly serious crime"); and (4) relief under the Convention Against Torture (because Jama failed to show that if returned to Somalia, he would be tortured by any governmental group or by a person acting in any official capacity). J.A. 1-25. The IJ ordered Jama removed to Somalia. *Id.* at 25. On May 9, 2001, the Board of Immigration Appeals affirmed that order "for the reasons set forth in [the IJ's] decision." *Id.* at 26-27.

After the INS initiated steps to remove Jama, he filed a petition for a writ of habeas corpus on June 28, 2001 in U.S. District Court for the District of Minnesota. Jama contended that the INS lacked statutory authority to remove him to Somalia because it had not established that Somalia (which lacks a functioning government) would accept his return. Adopting the report and recommendation of a magistrate judge, Pet. App. 21a-41a, the district judge granted the petition and

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[2] At his sentencing, Jama stated that he would prefer to be deported to Somalia in lieu of being sentenced to prison. *Id.* at 16.

ordered the INS not to remove Jama from the United States until the government of the country to which he was to be removed had agreed to accept him. *Id.* at 42a-55a.

The Eighth Circuit reversed, and remanded for entry of an order dismissing the petition. *Id.* at 1a-12a. The appeals court agreed with the district court that the federal courts had jurisdiction over the habeas corpus claim. It rejected the government's contention that jurisdiction was barred by 8 U.S.C. § 1252(g), which deprives courts of jurisdiction over claims arising from government efforts to "execute removal orders." The court explained that Jama was not objecting to the Attorney General's decision to execute the removal order, but to his "legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return." *Id.* at 3a.

Turning to the merits, the Eighth Circuit disagreed with the district court's conclusion that § 1231(b)(2) requires the INS to establish that Somalia will accept Jama's return prior to removing him to that country. *Id.* at 4a. The appeals court noted that § 1231(b)(2)(E) lists seven categories of countries to which an alien may be removed and that only the seventh category (§ 1231(b)(2)(E)(vii)) includes an explicit requirement that the government of the country in question "will accept the alien into the country." The court concluded that Congress's omission of a similar acceptance provision from clauses (I) through (vi) demonstrated that Congress did not intend to impose an acceptance requirement on removals carried out under any of those six clauses. *Id.* at 6a. The court added:

> Whether it is politically wise, efficient, or considerate of the United States to remove an alien without the prior acceptance of the alien's destination country is, quite simply, a question that lies outside our province.

Id. Judge Bye dissented. *Id.* at 9a-12a. He argued that regardless of the actual language of § 1231(b)(2), an acceptance requirement should be read into all provisions of the statute because that is the way courts consistently had read the statute over the preceding 45 years. *Id.* at 9a.

SUMMARY OF ARGUMENT

The courts below properly exercised jurisdiction over Jama's habeas corpus petition. Nonetheless, the jurisdictional issue is not as clear-cut as the courts below made it out to be, and the courts of appeals are in disarray regarding when aliens subject to removal proceedings are entitled to invoke the district courts' habeas corpus jurisdiction. Accordingly, although the issue of jurisdiction was not raised by either party, *amici* respectfully request that the Court address the issue in its decision. In particular, the Court should make clear that habeas corpus is not available to aliens fighting removal if they are otherwise entitled to judicial review under 8 U.S.C. § 1252 in the courts of appeals.

Federal law does not prohibit immigration officials from removing an alien to his country of birth even where that country lacks a functioning central government that is able either to accept the alien's return or to withhold acceptance. Jama's argument to the contrary is inconsistent with the wording of the relevant statutes. All parties to this litigation recognize that, as a practical matter, the government cannot remove someone to a country whose government is bound and determined not to accept the person. Accordingly, the government generally will not attempt such removal. Nonetheless, the rationale underlying that policy is wholly absent when the only reason that a country has not accepted an alien's return is that it lacks a functioning central government capable of conveying acceptance.

Jama is correct that Somalia is a dangerous place. But the Immigration Judge considered Jama's safety-related claims and found them inadequate to justify withholding of removal under the Convention Against Torture. Jama did not seek review of that ruling; accordingly, Jama has no basis for asserting that his removal would offend any safety-related policies established by Congress.

ARGUMENT

I. THE FEDERAL COURTS PROPERLY ASSERTED JURISDICTION OVER JAMA'S HABEAS CORPUS PETITION

Amici agree with the ultimate conclusion -- of both the district court and the Eighth Circuit -- that Congress has authorized the federal courts to exercise jurisdiction over Jama's habeas corpus petition. We nonetheless disagree with the analyses employed by the lower courts in reaching that conclusion and believe that the question is far more complex than the courts below acknowledged.

Although the federal government, in its response to the certiorari petition, abandoned its previous challenge to federal court jurisdiction over Jama's claims, it is always appropriate for this Court *sua sponte* to raise the issue of its own jurisdiction. "The requirement that jurisdiction be established as a threshold matter springs from the nature and limits of the judicial power of the United States and is inflexible and without exception." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94 (1998) (citations omitted). Particularly where, as here, the jurisdictional issue is unsettled and the lower courts appear to be confused regarding their jurisdiction over immigration matters, it would be entirely appropriate for the Court to address its jurisdiction before moving on to the merits of Jama's claims.

A. 8 U.S.C. § 1252(g) Deprives the Federal Courts of Jurisdiction over Jama's Challenge to the INS's Efforts to Execute the Removal Order

There was some degree of confusion in the courts below regarding the nature of Jama's claims. The district court focused on two separate events preceding Jama's habeas corpus petition: (1) the Board of Immigration Appeals's (BIA) May 9, 2001 affirmance of the IJ's order that Jama be removed from the United States to Somalia; and (2) the INS's May 25, 2001 notification to Jama that it intended to execute the removal order. According to the district court:

> Petitioner is not challenging the validity of his removal order nor is he challenging his current INS detention *per se.* Instead, petitioner is challenging the manner in which the INS plans to execute the removal order. More specifically, petitioner claims that the INS should not be allowed to physically transport him to Somalia and drop him there, unless and until some proper governmental authority in Somalia has agreed to accept him.

Pet. App. 45a.

To the extent that Jama is challenging anything *other* than the validity of the final order directing his removal to Somalia, the federal courts lack jurisdiction to hear the challenge. Specifically, any discrete challenge to the INS's efforts to "execute removal orders" against him is barred by 8 U.S.C. § 1252(g).[3] Indeed, that was the precise holding in *Reno v.*

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[3] 8 U.S.C. § 1252(g) provides:

> Except as provided in this section and notwithstanding any

(continued...)

American-Arab Anti-Discrimination Committee ["*AADC*"], 525 U.S. 471 (1999).

As *AADC* explained, § 1252(g) is a "zipper" clause that precludes judicial review of three discrete types of INS decisions or actions -- commencing proceedings, adjudicating cases, and executing removal orders -- *except* in accordance with the judicial review provisions of 8 U.S.C. § 1252. *AADC*, 525 U.S. at 482.[4] The point of § 1252(g) is not to place certain government actions beyond the scope of judicial review. Rather, the point is to channel any challenges to immigration enforcement actions into a single judicial proceeding, and thereby avoid repeated, piecemeal judicial appeals that could end up paralyzing enforcement efforts. *Id.* at 485.

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[3](...continued)

> other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or *execute removal orders* against any alien under this Act. (Emphasis added.)

[4] In general, § 1252 requires all such challenges to be filed in a federal appeals court within 30 days after entry of the final order of removal. *See* 8 U.S.C. § 1252(b). In addition to § 1252(g), § 1252 contains a second "zipper" clause, which states:

> Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceedings brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9).

AADC's application to this case is clear. Jama may *not* challenge the INS's legal determination (that he may be removed to a country that lacks a government capable of accepting his return) by challenging the INS's efforts to execute its removal order. Rather, § 1252(g) requires that any challenge to that legal determination be raised in connection with a challenge to the final order directing that he be removed to Somalia.

Even though the magistrate judge and the district judge understood the habeas corpus petition as a challenge to the INS's efforts to *execute* the removal order (rather than a challenge to the removal order itself), they both rejected the INS's § 1252(g) jurisdictional challenge. *See, e.g.*, Pet. App. 29a-30a ("In this case, as in *St. Cyr*, the statute at issue does not expressly purport to divest the federal district courts of habeas corpus jurisdiction. Section 1252(g) does not specifically mention habeas corpus review, and it should not be understood to eliminate such review merely by implication.") According to the district judge, "In light of *St. Cyr*, INS's principal argument -- that section 1252(g) forecloses the exercise of habeas jurisdiction over cases in which an alien challenges his imminent deportation -- is a dead letter." *Id.* at 47a (quoting *Carranza v. INS*, 277 F.3d 65 (1st Cir. 2002)).

The magistrate judge's and district judge's conclusions were based on a misunderstanding of § 1252(g), *AADC*, and this Court's subsequent decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved a resident alien facing a final removal order due to his felony conviction on drug dealing charges. His request for waiver of deportation was denied based on the Attorney General's determination that Congress had deprived him of discretionary authority to grant a waiver. The principal issue before this Court was whether the district court retained habeas corpus jurisdiction to consider St. Cyr's challenge to the deportation order: St. Cyr claimed that the Attorney General

still possessed waiver authority. The Court rejected the government's contention that Congress had intended to eliminate habeas corpus jurisdiction over St. Cyr's challenge. The Court noted that, for much of the last century, habeas corpus actions were the principal means by which aliens could test the legality of deportation orders. *St. Cyr*, 533 U.S. at 306. The Court also noted its "longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction." *Id.* at 298. The Court ruled that none of the statutes adopted in 1996 and relied on by the federal government constituted a sufficiently clear statement of congressional intent to repeal habeas jurisdiction over St. Cyr's challenge to his deportation order. *Id.* at 308-314.

The district court's contention that *St. Cyr* has deprived *AADC* of any vitality is not well-founded. *AADC* did not address a government assertion (as in *St. Cyr*) that Congress had stripped the federal courts of jurisdiction to hear challenges to aspects of the removal proceedings; rather, *AADC* simply decided that certain types of challenges may not be raised piecemeal but instead must be raised in connection with a § 1252 challenge to a final order of removal. *St. Cyr* never suggested that an alien may evade the bar on piecemeal challenges by simply labeling his suit as a habeas corpus petition. To the contrary, *St. Cyr* cited *AADC* approvingly in connection with its discussion of the § 1252(b)(9) "zipper" clause. *St. Cyr*, 533 U.S. at 313 n.37 (citing *AADC* in support of its conclusion that § 1252(b)(9) was adopted for the purpose of requiring consolidated judicial review of numerous types of INS actions in a single court of appeals proceeding).

Accordingly, the district court erred in holding that it possessed habeas corpus jurisdiction to hear claims arising from actions to "execute removal orders." Such jurisdiction is precluded by both § 1252(g) and § 1252(b)(9). To hold

otherwise would be to permit Congress's efforts to streamline the immigration appeals process to be frustrated by seriatim habeas corpus filings. In this case, the final order of removal specified that Jama was to be removed to Somalia. Any challenge to the federal government's determination that it was empowered to send Jama to Somalia should be made in connection with a challenge to the final order of removal, not in connection with a challenge to later actions taken by the government to execute that order.

The Eighth Circuit similarly muddled the government's § 1252(g) challenge to jurisdiction. In rejecting the government's position, the appeals court said:

> Mr. Jama, however, is not objecting to an unfavorable discretionary decision or action to execute the removal order. . . . He challenges, rather, the Attorney General's construction of a statute; specifically, the Attorney General's legal conclusion that 8 U.S.C. § 1231(b)(2)(E)(iv) authorizes the INS to remove Mr. Jama to Somalia without first establishing that Somalia will accept his return.

Pet. App. 3a. The appeals court's rejoinder misses the government's point. If one wishes to challenge one of the Attorney General's legal conclusions, one must do so in connection with a challenge to government action by which one has been adversely affected. If the government actions of which one complains are actions designed to "execute removal orders," then § 1252(g) provides that the proper means of challenging such actions is a consolidated § 1252 challenge to the final order of removal.

B. 8 U.S.C. § 1252(a)(2)(C) Does Not Preclude Habeas Corpus Jurisdiction Over Jama's Challenge to the Order that He Be Removed to Somalia

Jama's efforts to establish federal court jurisdiction over his petition is further complicated by 8 U.S.C. § 1252(a)(2)(C), a statutory provision adopted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). Section 1252(a)(2)(C) provides:

> Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [one of several enumerated criminal offenses].

Because Jama's assault conviction is one of the enumerated crimes, § 1252(a)(2)(C) would appear on its face to bar *all* judicial review of the final order directing that he be removed to Somalia. However, *St. Cyr* held otherwise, in a case involving an alien removable for having been convicted of one of the enumerated criminal offenses. The Court explained that while § 1252(a)(2)(C) was sufficiently clear to eliminate jurisdiction over Hobbs Act review proceedings created by the INA, it did not "speak[] with sufficient clarity to bar jurisdiction pursuant to the general habeas statute." *St. Cyr,* 533 U.S. at 313. Pursuant to *St. Cyr,* the district court possessed jurisdiction to review the final order directing that Jama be removed to Somalia.[5]

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[5] As noted above, Jama apparently insisted in the district court that he was challenging the INS's efforts to *execute* the final removal order, not the order itself. But because, in the context of this case, the final removal order and the INS's efforts to execute the order occurred almost simultaneously, there is little practical significance to the (continued...)

St. Cyr did, however, impose important limitations on habeas corpus jurisdiction. Key to the Court's recognition of habeas jurisdiction over the claims of aliens being deported for criminal activity was its recognition of "the strong presumption in favor of judicial review." *Id.* at 298. In the absence of habeas jurisdiction, alien felons resisting removal would have been deprived of all judicial review of their constitutional and statutory claims. Conversely, *St. Cyr* recognized, Congress should not be assumed to have permitted aliens resisting removal to assert claims in the district court by means of habeas corpus petitions when it has created an adequate procedure for asserting those same claims in the court of appeals. Thus, for example, in explaining why § 1252(b)(9) -- one of § 1252 "zipper" clauses -- did not bar habeas corpus actions by alien felons, the Court said:

> [§ 1252(b)(9)'s] purpose is to consolidate "judicial review" of immigration proceedings into one action in the court of appeals, but it applies only "[w]ith respect to review of an order of removal under subsection (a)(1)." 8 U.S.C. § 1252(b) (1994 ed., Supp. V). Accordingly, this provision, by its terms, does not bar habeas jurisdiction over removal orders *not* subject to judicial review under § 1252(a)(1) -- including orders against aliens who are removable by reason of having committed one or more criminal offenses. Subsection (b)(9) simply provides for the consolidation of issues to be brought in petitions for "[j]udicial review," which, as we note above, is a term historically distinct from habeas.

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[5](...continued)
nomenclature that Jama employed. By allowing Jama to proceed with his habeas corpus petition -- even a petition nominally targeted at Jama's efforts to execute a removal order -- the district court did not risk the type of piecemeal review that Congress was seeking to avoid when it adopted § 1252(g).

Id. at 313.

Aliens felons (such as Jama) are barred by § 1252(a)(2)(C) from seeking § 1252 review of their final removal orders and thus are permitted (per *St. Cyr*) to contest removal by filing a habeas petition. But, as *St. Cyr*'s discussion of § 1252(b)(9) indicates, those non-criminal aliens whose removal orders *are* "subject to judicial review under § 1252(a)(1)" are barred by § 1252(b)(9) from filing district court habeas petitions.

This distinction between criminal and non-criminal aliens is significant in the context of deportations to Somalia. The U.S. Court of Appeals for the Ninth Circuit has affirmed an injunction, on behalf of a nationwide class of Somalians living in the United States, barring removal of any aliens to Somalia for so long as Somalia lacks a functioning central government. *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). Included within the class certified by the district court are numerous Somalians who have not been convicted of felonies and thus are not barred from seeking judicial review of their removal orders under § 1252 in the courts of appeals. As *St. Cyr* makes clear, the district court lacked jurisdiction over the habeas corpus claims of those noncriminal aliens.[6]

In sum, the courts below properly exercised jurisdiction over Jama's habeas corpus petition, to the extent that he was seeking review of his final order of removal. In the absence of such review, he would be denied a judicial forum within which to challenge the INS's decision that he can be sent to Somalia

[6] The Ninth Circuit is not alone among the courts of appeals in its misreading of *St. Cyr*. *See, e.g., Liu v. INS*, 293 F.3d 36 (2d Cir. 2002) (habeas corpus review is available to non-criminal aliens, notwithstanding the fact that they have access to direct review); *Chmakov v. Blackman*, 266 F. 3d 210 (3d Cir. 2001) (same).

without the consent of that country, and there is no clear indication that Congress intended to deny all review. Nonetheless, even though none of the parties has raised the issue of jurisdiction, in light of the widespread confusion among the lower federal courts regarding the meaning of *St. Cyr*, *amici* suggest that the Court address the issue of jurisdiction in its opinion.

II. IMMIGRATION OFFICIALS MAY REMOVE JAMA TO SOMALIA UNDER § 1231(b)(2)(E) WITHOUT REGARD TO SOMALIA'S LACK OF A FUNCTIONING CENTRAL GOVERNMENT

Jama does not contest that he has been convicted of a crime involving moral turpitude and that he thereby is subject to removal. Nor does he contest the IJ's determinations that he is ineligible for withholding of removal and that he does not qualify for relief under the Convention Against Torture. Nor does he contend that removal to Somalia would violate any of his rights under the Constitution. Rather, his sole claim is that the federal government is not authorized under 8 U.S.C. § 1231(b)(2) to remove him to a country that lacks a functioning central government and thereby is unable either to accept his return or to withhold acceptance.

Jama's claim lacks any basis in the language of the statute. The government ordered that Jama be removed to Somalia based on 8 U.S.C. § 1231(b)(2)(E)(iv), which permits removal to "[t]he country in which the alien was born." Nothing in clause (iv) indicates that such removals are permissible *only* if the country agrees to accept the alien's return. Tellingly, the seventh of the seven clauses in § 1231(b)(2)(E) *does* include an

explicit acceptance requirement[7] -- thereby indicating that the other six clauses (which lack similar language) do *not* include an acceptance requirement. That omission is critical, for:

> Where Congress includes particular language in one section of [the Immigration and Naturalization Act] but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.

INS v. Cardoza-Fonseca, 480 U.S. 421, 432 (1987).

Jama argues that use of the word "another" in clause (vii) (". . . another country whose government will accept the alien into that country") suggests that the acceptance requirement of that clause should be read into the previous six clauses; *i.e.*, "that the acceptance requirement in (vii) is *additional* to an acceptance requirement in the first six subparts." Pet. Br. 24. That interpretation of the word "another" is highly implausible. A far more natural reading is to interpret the word "another" as referring simply to a country other than a country specified in clause (I) through clause (vi). Jama's interpretation requires an assumption that will often be false: that the government of each of the countries specified in clause (I) through clause (vi) will, in fact, accept the alien into its country.

The language of clause (vii) actually provides a very good reason why an acceptance requirement should *not* be read into

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[7] 8 U.S.C. § 1231(b)(2)(E)(vii) provides:

> If impracticable, inadvisable, or impossible to remove the alien to each country described in a previous clause of this subparagraph, [the Attorney General shall remove the alien to] another country whose government will accept the alien into that country.

the prior six clauses. The government is directed to remove an alien to a country specified in clause (vii) *only* if it is "impracticable, inadvisable, or impossible to remove the alien to each country described" in clauses (I) through (vi). 8 U.S.C. § 1231(b)(2)(E)(vii). That language thus imposes specific limitations on the government's authority to remove an alien to a country described in clauses (I) through (vi): such removals are unauthorized if "impracticable, inadvisable, or impossible." Because Congress specifically enumerated three limitations on removal powers under clauses (I) through (vi), there is no reason to conclude that Congress intended other limitations that it did not state.

The prohibition against "impracticable, inadvisable, or impossible" removals serves to highlight a reality recognized by all parties to this litigation: as a practical matter, the government cannot remove someone to a country whose government is bound and determined not to accept the person. Thus, if the INS places an individual on a plane or ship bound for Country X, the government of Country X can frustrate the INS's removal efforts by placing the same individual on the plane or ship's return trip. In recognition of that reality, the federal government's general policy is *not* to attempt to remove an alien to a country that refuses to accept him. But that policy is not implicated in the case of a country without a functioning central government; in the absence of a government, there is unlikely to be anyone in that country in a position to prevent the alien's reentry.

Jama also argues that failing to read an acceptance requirement into clauses (I) through (vi) would "create an inconsistency in the statute." Pet. Br. 27. Jama asserts that 8 U.S.C. § 1231(b)(2)(D) prohibits removal to a country "of which the alien is a subject, national, or citizen" unless the government of that country consents to the removal. Yet, he

asserts, § 1231(b)(2)(D)'s acceptance requirement would be rendered "superfluous," thereby "violating a basic principle of statutory construction," if the federal government could remove the alien to his country of birth (which will often be the same country as the country of which he is a "subject, national, or citizen") under § 1231(b)(2)(E)(iv) without obtaining the country's consent. *Id.*

Jama's argument is deficient in at least two respects. First, it is not strictly correct that § 1231(b)(2)(D) includes an acceptance requirement. That provision states that if a removable alien is not removed to a country of his designation, then the alien "shall" be removed to a country of which he is a subject, national, or citizens. One of the exceptions to that mandatory requirement occurs when the government of the country "is not willing to accept the alien into the country." 8 U.S.C. § 1231(b)(2)(D)(ii). But that exception is the converse of an acceptance requirement -- it applies *only* if there is a government in the country that expresses an unwillingness to accept the alien. If the government simply declines to respond to an acceptance request or if there is no government, it cannot be said that there is a government that "is not willing to accept the alien." Moreover, even if this exception somehow were found to be applicable to Jama's case, it would merely negate the mandatory nature of the government's removal obligation under § 1231(b)(2)(D); the statute is silent on the circumstances under which the Attorney General *may*, at his discretion, remove the alien to a objecting country.

Second, even if § 1231(b)(2)(D) were interpreted as Jama suggests, the statute would still not be rendered superfluous. The Attorney General may explore the possibility of removing an alien to one of the countries listed in § 1231(b)(2)(E) *only* if the alien is not removed pursuant to the procedures set forth in § 1231(b)(2)(D). While it is true that an alien might then be

removed (under § 1231(b)(2)(E)(iv)) to the country of his birth and that the country of birth may well be the same country of which the alien is a subject, national, or citizen and which previously expressed an unwillingness to accept the alien, the alien might also be removed to some other country specified in clauses (I), (ii), (iii), (v), or (vi). Under those circumstances, § 1231(b)(2)(D)'s supposed acceptance requirement would not be rendered a dead letter: only the foreign government's refusal to accept the alien would open up the possibility that the U.S. government could send the alien to one of the countries specified in clauses (I), (ii), (iii), (v), or (vi).

In sum, nothing in the language of § 1231(b)(2) supports Jama's contention that the federal government is statutorily prohibited from removing an alien to a country that lacks a functioning central government capable of signifying its acceptance of the alien.

A. Somalia's Dangerousness Does Not Provide Grounds for Prohibiting Jama's Removal to Somalia

Throughout his brief, Petitioner repeatedly makes note of the dangerous conditions that exist in Somalia. In light of those conditions, it is understandable why Jama might wish to remain in the United States.[8] Nonetheless, conditions in Somalia do not present a statutory impediment to Jama's removal to that country.

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[8] *Amici* note, however, that Jama's views on whether it is safe for him to go to Somalia have been inconsistent. For example, Jama proposed to the judge at his criminal trial that he would prefer immediate removal to Somalia to being sent to prison. J.A. 16. Only now, when he can foresee the possibility that he will be released into American society, has Jama become very concerned about safety conditions in Somalia.

Jama repeatedly asserts that one of Congress's purposes in enacting § 1231(b)(2) was to "ensure a safe transfer of the alien to the government of the receiving country." Pet. Br. 17. Jama provides no support for that assertion, and none is readily apparent. Indeed, Congress bent over backwards to ensure that § 1231 is not interpreted as a statute adopted for the benefit of removable aliens. For example, § 1231(h) states explicitly: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person."

The INS is not, of course, oblivious to Jama's personal safety. Under Article 3 of the Convention Against Torture, Jama would have been entitled to relief from removal if he could have demonstrated that he would be subject to torture if returned to Somalia. *See* 8 C.F.R. § 208.17. But after carefully reviewing the evidence, the IJ denied such relief because he determined that Jama failed to show that he would be subject to torture in Somalia. J.A. 23-25. Jama did not seek judicial review of that determination. Accordingly, Somalia's dangerousness has no bearing on Jama's right to avoid removal.[9]

[9] Both Jama and *amici* International Human Rights Organizations and International Law Professors assert that the dangerous conditions in Somalia also trigger U.S. obligations under the International Covenant on Civil and Political Rights ("Covenant"), Dec. 16, 1966, 993 U.N.T.S. 3, not to send aliens back to Somalia. But as the Court made clear just last month, the Covenant can provide no support for Jama's claims under United States law. "The United States ratified the Covenant on the express understanding that it was not self-executing and so did not create obligations enforceable in the federal courts." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2004 U.S. LEXIS 4763 at *74 (2004).

Jama notes that because of its dangerousness, Somalia "is included in a small group of countries for which Temporary Protected Status is available." Pet. Reply Mem. at 3 n.3. Those who apply for and receive Temporary Protected Status ("TPS") can avoid removal to their native country and can receive employment authorization for so long as the country continues to be designated under the TPS program. *See* 8 U.S.C. § 1254a; 68 Fed. Reg. 43,147 (July 21, 2003). But because Jama has been convicted of a felony, he is statutorily ineligible to receive protected status. 8 U.S.C. § 1254a(c)(2)(B).

Nor is Jama being singled out for particularly severe exposure to danger. There are eight countries currently designated under the TPS program, yet aliens are deported on a regular basis to all eight. Nor are felons the only group ineligible for protected status; citizens of designated countries generally are ineligible unless they have lived in this country for a significant period of time. For example, Somalians are not eligible unless they have lived in this country continuously since September 4, 2001. Moreover, given that Congress explicitly determined that convicted felons such as Jama are ineligible for protection under the TPS program, there is no reason to conclude that Congress intended that similar protections be read into § 1231(b) for the benefit of alien felons resisting removal efforts.

B. Nothing About the History of § 1231(b)(2) Suggests that Congress Ratified the Counter-Textual Interpretation Espoused by Jama

In its brief, the United States has explained at length why Congress and the Executive Branch should not be deemed to have ratified Jama's interpretation of § 1231(b)(2), an interpretation that runs counter to the plain meaning of the words used in the statute. *Amici* will not repeat all those

arguments here but rather will mention briefly a few major points.

First, Jama is incorrect in asserting that the case law on § 1231(b)(2) is well-settled and supports his position. In none of the cases cited by Jama was the court presented with the same fact pattern presented here: a country that can neither accept the alien's return nor withhold acceptance because it lacks a functioning central government. Moreover, in many of the cited cases, the court's statements regarding an acceptance requirement were pure dicta; they had nothing to do with the holdings of those cases. *See, e.g., Pelich v. INS,* 329 F.3d 1057 (9th Cir. 2003); *Amanulla v. Cobb,* 862 F.2d 362 (1st Cir. 1988); *Lee Wei Fang v. Kennedy,* 317 F.2d 180 (D.C. Cir. 1963).

Second, *Matter of Neisel,* 10 I. & N. Dec. 57 (BIA 1962), cannot be explained away by Jama. The most plausible reading of that decision is that the Board of Immigration Appeals determined that there is no acceptance requirement in the first six clauses of § 1231(b)(2)(E). While Jama attempts to impose on that decision a reading that is consistent with his position, an objective reader would be forced to conclude at the very least that the decision is susceptible of an interpretation that supports the government's position. In light of that conclusion, one cannot claim that Congress, when amending the immigration laws, would have concluded that the courts had arrived at a settled interpretation of the law.

When the lower courts are in disagreement over the interpretation of a statutory provision, it cannot be presumed that Congress -- merely because it failed to amend the provision while making other changes to the statute -- acquiesced in the statutory interpretation adopted by the majority of courts. *United States v. Powell,* 379 U.S. 48, 55 n.13 (1964). In any

event, arguments that Congress through inaction has acquiesced to the interpretation of court decisions, particularly decisions from lower courts, "'deserve[s] little weight in the interpretive process.'" *Alexander v. Sandoval,* 532 U.S. 275, 292 (2001) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)).

Finally, as the Department of Homeland Security and the Department of Justice cogently demonstrated in a July 19, 2004 Federal Register notice, it has never been the position of the Executive Branch that all the removal provisions of § 1231(b)(2) include acceptance requirements. *See* "Execution of Removal Orders; Countries to Which Aliens May Be Removed," 69 Fed Reg. 42,901 (July 19, 2004). The document provides notice of proposed DHS/DOJ regulations that would interpret § 1231(b)(2) in a manner consistent with the Eighth Circuit's decision in this case. *Id.* at 42,908. If and when the proposed regulations are adopted in final form, they will be entitled to substantial deference.

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment below.

Respectfully submitted,

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